SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 96

TOM ESKRIDGE, PETITIONER,

vs.

MERLE E. SCHNECKLOTH, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

33928

In the Matter of the Writ of Certiorari of

TOM ESKRIDGE, Petitioner,

v.

MERLE E. SCHNECKLOTH, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent.

PRAECIPE—Filed December 9, 1957

To: Robert Holstein, Clerk of the Supreme Court of the State of Washington:

Please prepare and certify to the Clerk of the United States Supreme Court as the Record in Cause No. 33928 in the Supreme Court of the State of Washington entitled "In the Matter of the Application for a Writ of Habeas Corpus of Tom Eskridge, Petitioner, v. Merle E. Schneckloth, as Superintendent of the Washington State Penitentiary, Respondent" those documents and portions of the Records of the Supreme Court of the State of Washington which are designated and set forth in the attached Stipulation in the above action, which designations are herewith incorporated as though fully set forth.

Robert W. Graham, Attorney for Petitioner. John J. O'Connell, Attorney General, State of Washington; Michael R. Alfieri, Assistant Attorney General, State of Washington, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 2] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

33928

In the Matter of the Writ of Certiorari of

TOM ESKRIDGE, Petitioner,

v.

MERLE E. SCHNECKLOTH, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent.

STIPULATION—Filed December 9, 1957

It is hereby Stipulated by and between the parties herein, through their undersigned attorneys of record, that the following documents and each of them shall be certified by the Clerk of the Supreme Court of the State of Washington as being and included in the Record before that court in Cause No. 33928, entitled "In the Matter of the Application for a Writ of Habeas Corpus of Tom Eskridge, Petitioner, vs. Merle E. Schneckloth, as Superintendent of the Washington State Penitentiary, Respondent":

(1) Motion for Leave to Proceed in Forma Pauperis, together with order endorsed thereon granting motion.
(2) Petition for a Writ of Habeas Corpus, together with Exhibits.
(The Exhibits to the Petition are included within the documents contained in Item (10) below.)
(3) Respondent's Return and Answer.
(4) Petitioner's Reply to Respondent's Return and Answer.
(5) Respondent's Memorandum.
(6) Order Denying Petition.
(7) Letter of Benjamin T. Hart to Petitioner, October 3, 1956.
(8) Motion for Rehearing En Banc.
(9) Order Denying Petition for Rehearing.

[fol. 3]

(10) Transcript consisting of 40 pages of those portions of the proceedings in Criminal Cause No. 11114 in the Superior Court of the State of Washington in and for Spokane County, being a part of the record in Cause No. 26088 in the Supreme Court of the State of Washington entitled "State of Washington ex rel. Thomas Eskridge, Relator, vs. Fred M. Witt, Judge of the Superior Court of the State of Washington in and for Spokane County, Respondent", which portions are designated in the Index attached to Respondent's Memorandum.

(11) The following additional portions of the record in Cause No. 26088:

(a) Motion for Writ of Mandate.

(b) Petition for Writ of Mandate.

(c) Affidavit of petitioner in support of Motion for Writ of Mandate dated Feb. 11, 1936.

(d) Affidavit of petitioner in support of Motion for Writ of Mandate dated April 13, 1936.

(e) Transcript of Endorsement on motion docket —"denied", of April 24, 1936.

(f) Transcript of Record in Journal 34 at page 161 for Wednesday, May 27, 1936 entitled "Judgment."

(12) The following portions of the record in Cause No. 26179 in the Supreme Court of the State of Washington entitled "State of Washington, Respondent vs. Tom Eskridge, Appellant":

(a) Motion to Dismiss Appeal and Supporting Affidavit of Ralph E. Foley.

(b) Notice.

(c) Affidavit of Service.

(d) Transcript of Entry on Motion Docket dismissing appeal.

(e) Transcript of Record in Volume 33 at page 154 of the Court Record Journal for Wednesday May 27, 1936 entitled "Judgment."

(13) The following enumerated documents incorporated by reference in Respondent's Return and Answer, which enumerated documents are a part of the records of the Supreme Court of the State of Washington in Cause No. 32466, entitled "In the Matter of the Application for a Writ of Habeas Corpus of Tom Eskridge":

[fol. 4]

(a) Information.

(b) Judgment and Sentence and Warrant of Commitment (To be printed as page *13* of Item 10 above).

(c) Special Verdict (To be printed as page 2 of Item 10 above).

(d) Prosecutor's Report.

(14) Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Habeas Corpus in Cause No. 32466.

It Is Further Stipulated that each of the documents above listed, together with all documents on file with the Clerk of this Court, including all exhibits attached to the Petition for Writ of Certiorari, shall be designated and printed as a part of the printed record of this proceeding, provided, however, that the Appendix to Respondent's Memorandum (Item No. 5 above) need not be reprinted, it being included within the transcript of proceedings identified as Item No. 10 above, and provided further that the exhibits to the Petition for Writ of Certiorari need not be reprinted where duplication is indicated below:

Ex. 1—To be printed as Item No. 6 above.

Ex. 2—To be printed as Item No. 1 and 2 above.

Ex. 3—To be printed as Item No. 8 above.

Ex. 4— Print.

Ex. 5—To be printed as page 22 of Item No. 10 above.

Ex. 6—To be printed as page 39 of Item No. 10 above.

Ex. 7—(Information.) To be printed as Item 13 (a) above.

Ex. 7a—(Judgment Sentence and Commitment.) To be printed as Page 13 of Item No. 10 above.

Ex. 8, 8a and 8b—Print.
Ex. 9—Print.
Ex. 10—To be omitted.

Robert W. Graham, Attorney for Petitioner. John J. O'Connell, Attorney General, State of Washington, Michael A. Alfieri, Assistant Attorney General, State of Washington, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 5] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

MERLE R. SCHNECKLOTH, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AFFIDAVIT IN SUPPORT, AND ORDER GRANTING SAME—July 25, 1956.

To: The Honorable Chief Justice Frederick G. Hamley of the above entitled Court

Comes now Tom Eskridge, the above named Petitioner, based upon his Affidavit, moves the Court for an Order granting leave to proceed in Forma Pauperis.

Respectfully requested, Tom Eskridge, Petitioner pro se.

STATE OF WASHINGTON
County of Walla Walla, ss:

Tom Eskridge, first being duly sworn deposes and says: That he is the above named petitioner; that he is a Citizen of the United States of America; and a person without property, personal, real or otherwise, and without Money

to pay the costs of the action he seeks but verily believes himself entitled to the redress sought. That because of such poverty he must pray the Court grant him leave to proceed in Forma Pauperis.

Wherefore, Petitioner prays his prayer be granted and an Order issued by the Honorable Chief Justice, Ordering the proceedings to be in Forma Pauperis.

Tom Eskridge, Petitioner pro se.

Subscribed and Sworn to before me this 29th day of June, 1956.

F. J. Fink, Notary Public in and for the State of Washington, residing in Walla Walla County.

Request to proceed in Forma Pauperis Is Granted, July 25, 1956.
Charles T. Donworth, Chief Justice.

[File endorsement omitted.]

[fol. 6] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

MERLE R. SCHNECKLOTH, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS—Filed July 25, 1956.

To The Honorable Chief Justice Frederick R. Hamley of the above entitled court.

Your petitioner, Tom Eskridge, hereby applies to this Court for a Writ of habeas corpus. He calls attention here-

with to the judgment recently announced by the Supreme Court of the United States in the case of Griffin and Crenshaw v. The People of the State of Illinois—No. 95—October Term, 1955, which was a ruling on state appeals in forma pauperis, and he submits this petition as an original application under the provisions of the Constitution of the State of Washington and the Laws enacted thereto.

In support of this application and petition Your Petitioner respectfully alleges and states as follows:

I

That by birth he is a citizen of the United States of America, and of the State of Washington wherein he resides, and as such, is entitled to all benefits and immunities of due process of law and to the equal protection of the laws as guaranteed him by the Constitutions of the State of Washington and of the United States.

II

That he is restrained of his liberty by unlawful imprisonment in the Washington State Penitentiary at Walla Walla, and that the person by whom he is so imprisoned and restrained is the Superintendent thereof, Merle R. Schneckloth.

III

That petitioner was confined in said penitentiary on the [fol. 7] 16th day of December, 1935, on a judgment, sentence, and commitment which issued from the Superior Court of Spokane County on the 14th day of December, 1935, on a verdict of guilty of first degree murder. (Exhibits page 1.)

IV

That the illegality of petitioner's detention is based upon the following facts:

He was denied the right to appeal as afforded others under the Constitution of the State of Washington. (Exhibit #2)

V

That this said right of appeal is guaranteed the accused in criminal prosecutions in all cases by the 10th Amendment

supplement to Article 1, Sec. 22, of the Constitution of the State of Washington.

VI

That the party responsible for denying petitioner the right to appeal was the Honorable Judge Fred H. Witt, presiding in the case of The State of Washington vs. Tom Eskridge, Cause No. 11114, Spokane County.

VII

That the trial Court's action in denying petitioner's application for the transcript of the trial at the expense of Spokane County, which was supported by an affidavit of poverty and allegations of errors which occurred during the trial, was based on the Court's individual opinion that petitioner had had a fair and impartial trial and that justice would not be promoted by supplying petitioner with a transcript at the expense of Spokane County, and the said Court signed an order to that effect on the 20th day of January, 1936. (Exhibit #2)

VIII

That the trial Court issued the above mentioned order under the authority of a Washington statute (RCW 2.32.240) purporting to provide free transcripts for indigent defendants, which states:

> " * * * *Provided,* That when the defendant in any criminal case presents to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript fee therefor shall be paid out of the [fol. 8]county treasury as other expenses of the court are paid."

IX

That in March, 1936, petitioner filed in the state supreme court a petition for a writ of mandate with several motions and affidavits in support thereof, under Cause No. 26083, Wash. Ex Rel Thomas Eskridge vs. Fred H. Witt, Judge, Superior Court, Spokane County, seeking an order re-

quiring the lower court to provide petitioner with a free transcript. This action was denied by the supreme court but petitioner wasn't notified officially until the 20 of January, 1947, owing, possibly, to an error in a belief that petitioner was still represented by counsel, which he was not. (Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 10.)

X

Petitioner believes that the law (RCW 2.32.240) granting certain indigent defendants access to the trial transcript, is unconstitutional in that it permits the trial judge to substitute himself for the supreme court in the matter of appellate relief for destitute defendants which is a direct denial of due process of law as guaranteed the accused in criminal prosecutions in this state, Article 1, Section 3; and a violation of the equal protection clause of the 14th Amendment of the Constitution of the United States.

The 10th Amendment, supplementing Section 22 of Article 1 of Washington's constitution, states plainly and precisely that the accused in criminal prosecutions shall have the right to *counsel;* to a *copy of the accusation;* to *meet witnesses against him face to face;* to *compel the attendance of witnesses;* to a speedy *public trial* by an impartial *jury;* and the right to *appeal in all cases.* (Petitioner's underscore).

All the rights emphasized in the preceeding paragraph are extremely important to the accused in any criminal proceeding and it would seem that if the writers of the constitution meant that one of them was to be made available to the accused before final judgment, all of them were to be, because all of them are contained in one constitutional provision which ends with the sentence:

> " * * * In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." (L. 1921, p. 79, Sec. 1.) Approved November, 1922.

Petitioner is not trained in legal proceedings or in the language of the law. Nevertheless, the term "final judgment" must have meant, in the minds of the writers of Article 1, Section 22, the last decision in every criminal [fol. 9] action, especially the judgment of a trial if there

is no constitutional provision for appeal. But if appeal is available to the defendant and he files notice thereof, it follows that final judgment on the appeal action must occur when the higher court either affirms, reverses, or dismisses the appeal. Inasmuch as the notice of appeal starts an entirely new action, under a different cause number and in a different court, it is extremely difficult for petitioner to reconcile himself to the premise that the term "final judgment" in law means only one thing—the trial judgment. If a trial judgment is reversed on appeal its finality is certainly of limited duration. Many a person once condemned to death by a trial judgment is walking the streets today.

XI

If it holds that "final judgment" means the trial court's judgment in so far as the State of Washington's constitutional provisions for appellate review is concerned in cases where the accused is poor and destitute, petitioner then attacks the statute that purportedly provides impecunious defendants with a free trial transcript for the purpose of appeal, and alleges that it is a vicious, monstrous barrier erected under false colors for the purpose of denying certain poor persons among the accused the material right of appellate review. As set forth above petitioner showed that he was denied due process of law and the equal protection of the laws by the said Fred H. Witt, judge of the Superior Court for Spokane County.

On or about the 10th day of August, 1935, a matter of only three months prior to his trial for first degree murder, petitioner appeared in court before Judge Witt for judgment on a plea of guilty to the charge of grand larceny, which involved the theft of two typewriters from the Spangle school house in Spokane County. At the time petitioner was on parole from San Quentin Penitentiary in the state of California. The court showed extreme passion and prejudice toward petitioner in pronouncing judgment for the typewriter theft, he said:

> "I'm tired of you exconvicts coming up here from California and breaking into business establishments and stealing money and property. It is going to stop! I hereby sentence you to 15 years in the state peniten-

tiary at Walla Walla, and I recommend that you serve the full 15 years. Yes, if I have my way about it you will serve every day of the 15 years!"

Thus when petitioner three months later appeared again before this same judge for trial on a charge of first degree [fol. 10] murder, and the judge found it necessary in his instructions to the jury to repeat the several unproved aliases charged to petitioner in the Information, petitioner concluded that the Court put him at a disadvantage by suggesting to the jury that petitioner had a past criminal record, therefore, highly improbable that the same Court had a free and unbiased mind when he was considering petitioner's application for the trial transcript.

XII

In the Griffin and Crenshaw case mentioned above, Mr. Justice Black said:

(p. 6, para. 2) "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law." *There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.* (Petitioner's underscore)

"(The Criminal Court of Appeals in Oklahoma in 1913 spoke in the tradition of this country's dedication to due process and equal protection when it

declared that the law is no respecter of persons and said:

> "We want the people of Oklahoma to understand, one and all, that the poorest and most unpopular person in the state . . . can depend upon it that justice is not for sale in Oklahoma, and that no one can be deprived of his right of appeal simply because he is unable to pay a stenographer to extend the notes of the testimony." Jeffries v. State, 9 Okla. Cr. 573, 576, 132, p. 823, 824.)

But the case at bar presents a little different situation. Your petitioner was not only denied appellate review on account of being a poor person but he was also denied this right, and privilege because in one man's opinion justice would not be promoted by permitting this particular petitioner the necessary transcript. On the same page but in the first paragraph of this Griffin and Crenshaw case Justice said:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."

In a separate opinion but concurring with the judgment in the same case Mr. Justice Frankfurter said: (page 2 para. 1)

> "Surely it would not need argument to conclude that [fol. 11] a State could not, within its wide scope of discretion in these matters, allow an appeal for persons convicted of crimes punishable by imprisonment of a year or more, only on payment of a fee of $500. Illinois, of course, has done nothing so crude as that. But Illinois has said, in effect, that the Supreme Court of Illinois can consider alleged errors occurring in a criminal trial only if the basis for determining whether there were errors is brought before it by a bill of exceptions and not otherwise. . .
>
> "This Court would have to be wilfully blind not to know that there have in the past been prejudicial trial errors which called for reversal of convictions of in-

digent defendants, and that the number of those who have not had the means for paying for the cost of a bill of exceptions is not so negligible as to invoke what ever truth there may be in the maxim *deminimis*."

Near the bottom of page 6 of this opinion Justice Frankfurter said in conclusion:

"We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That is a consonant with the spirit of our law and justified by those considerations of reason which should dominate the law, has been luminously expounded by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the Court."

Earlier in the Court's opinion Justice Black, on page 6, para. 2, said:

"Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can be no more discriminate on account of poverty than on account of religion, race or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *See discussion in *Hovey* v. *Elliot*, 167 U. S. 400.

Petitioner firmly believes that the excerpts above, taken from the judgment announced in the Griffin and Crenshaw case by the Supreme Court of the United States on the

23rd day of April, 1956, fully support his contention that the discretionary denial of his application for the transcript of his first degree murder trial 21 years ago, prevented him from having his legal day in court. That said denial prohibited him from showing Your Honorable Court the following complaints:

1. The Superior Court's denial of an extension of time necessary to prepare an adequate defense.

2. The Information was faulty, it was duplicious in contruction and intent.

3. Illegal evidence and perjured testimony.

[fol. 12] 4. A denial of counsel at vital points in the proceedings against petitioner.

5. The Court's prejudicial instructions to the jury.

All of which, had they been duly rectified, would have permitted petitioner to have a fair and impartial trial, an inherent right sought by everybody and guaranteed every citizen of the State of Washington and of the United States by the State and Federal constitutions. These allegations are supported by a number of exhibits which are attached hereto and mad a part thereof as fully as if set out in haec verba.

XIII

A writ of habeas corpus is the only way petitioner has at this time to secure his rights. Wherefore, he prays that the Honorable Chief Justice will issue a writ of habeas corpus, out of and under the seal of this Court, directed to Merle R. Schneckloth, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, requiring him to produce the body of petitioner, Tom Eskridge, at the time and place to be fixed in the said writ, to the end that the said Tom Eskridge may be dealt with according to the law in such case made and provided. Petitioner further prays that the Court will issue an order requiring said Merle R. Schneckloth to show cause why the said writ of habeas corpus should not be allowed.

All of which is respectfully submitted by

Tom Eskridge, petitioner in pro se.

Duly sworn to by Tom Eskridge. Jurat omitted in printing.

[fol. 13] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

MERLE R. SCHNECKLOTH, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent.

RETURN AND ANSWER—Filed August 25, 1956

Comes now Merle R. Schneckloth, Superintendent of Washington State Penitentiary at Walla Walla, Washington, by and through his attorneys, Don Eastvold, Attorney General, and Michael R. Alfieri, Assistant Attorney General, and for return and answer to the petition for writ of habeas corpus in the above entitled court, alleges, admits and denies as follows:

I.

Respondent denies each and every allegation made and thing contained in the petition of Tom Eskridge for a writ of habeas corpus, except such portions thereof as may be herein admitted by respondent's affirmative answer and return.

Further answering and by way of affirmative answer and return, respondent alleges:

I

That on the 17th day of October, 1935, information was filed in Superior Court of the State of Washington for [fol. 14] Spokane County, charging this petitioner with the crime of murder in the first degree.

II

That on the 14th day of December, 1935, pursuant to the finding by jury of guilty of murder in the first degree, judgment and sentence was entered against the petitioner

and a special verdict by the jury that the death penalty would not be inflicted, whereupon the court sentenced this petitioner to imprisonment at the Washington State Penitentiary for his natural life.

III

That pursuant to the judgment and sentence warrant of commitment was issued on the 14th day of December, 1935, directing the petitioner then be delivered to the warden of the State Penitentiary for confinement.

IV

That by reference to the file Supreme Court Cause No. 32466 to the return and answer therein. Following enmumerated documents attached to the return and answer therein which are the certified copies of the original information, special verdict, judgment and sentence, warrant of commitment and prosecutors' report are by reference made a part hereof same as though fully set out.

V

The petitioner is legally held pursuant to said judgment and sentence and warrant of commitment, that his sentence [fol. 15] has not expired, he has not been granted a pardon nor is he entitled to parole.

VI

That the court had jurisdiction over the person of the petitioner and the authority to enter a sentence, the judgment and sentence is not void on its face and the petitioner has stated no grounds for the granting of the writ of habeas corpus.

Wherefore, having fully answered petitioner's application for a writ of habeas corpus, respondent prays that the petition for a writ of habeas corpus be dismissed and respondent be discharged from further answer herein.

Don Eastvold, Attorney General, Michael R. Alfieri, Assistant Attorney General.

Duly sworn to by Michael R. Alfieri. Jurat omitted in printing.

[fol. 16] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

MERLE R. SCHNECKLOTH, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent.

PETITIONER'S REPLY TO RESPONDENT'S RETURN AND ANSWER —Filed September 14, 1956

Comes now Tom Eskridge, petitioner, and in reply to Respondent's return and answer filed in the above entitled case, points out that respondant has made no answer whatever to the pertinent allegations made and presented by petitioner in the above cause, other than to allude to certain certified copies of documents in the return and answer to an old Supreme Court Cause, No. 32466, in which petitioner sought relief, unsuccessfully, from illegal and unconstitutional imprisonment. He totally ignores the fact that petitioner is complaining of being denied his constitutional right of appeal.

Petitioner reminds the Court that his petition for a writ of habeas corpus in the above entitled case raises one question and one question only, namely: Was he denied the due process of law and the equal protection of the laws as guaranteed by Article I, section 22, supplemented by the 10th Amendment, of the Constitution of the State of Washington, and Section 1 of the 14th Amendment to the Constitution of the United States, respectively, and by a recent ruling of the United States Supreme Court in the Griffin and Crenshaw vs. The People of the State of Illinois case, when he was discriminately denied his constitutional right to appeal in a state which grants appellate review?

To the best of petitioner's knowledge, this question, in the light of the federal decision in the Griffin and Crenshaw

case, has never been decided in the State of Washington. It seems quite apparent that respondent's attorney doesn't [fol. 17] want it settled now, considering the extraneous, irrelevant and immaterial matter brought up in his return and answer obviously as a smoke screen to cloud the facts and evade the issue, as well as to divert the Honorable Court's attention from the one inextinguishable question—was the petitioner denied his constitutional right to appeal by the trial court's arbitrary and biased action in witholding the trial transcript?

If petitioner had been given access to the trial transcript immediately following his timely oral notice of appeal, he certainly would have shown this Honorable Court that not one bit of evidence was produced, or testimony developed throughout the course of the nine days of trial, to warrant either premeditated murder or murder while attempting or intending a robbery. However, the trial transcript will show that petitioner's counsel timely objected to perjured testimony designed to mislead and misinform the court and the jury, and objected to a checkered cap, two sizes too small for petitioner's head, and to a brown coat-sweater which had dark red stains on it which were not blood stains, but the prosecution, over defense counsel's objections, was permitted to wave it in front of the jury in support of allegations that the sweater belonged to petitioner and that the dark red stains on it were blood from the alleged victim of the alleged murder. Petitioner discovered that the dark red stains on the said sweater were semi-liquid lipstick that had been squeezed from a large tube of lipstick that had been wrapped in the sweater at some time or other, and that the prosecution well knew from the beginning of the trial that the dark red stains on the sweater, admitted in evidence over counsel's objection, were not blood stains. The trial transcript will show beyond all doubt that the state's star witness gave perjured and misleading testimony when he testified that petitioner was at the scene of the alleged crime. Also, the transcript will show prejudice on the part of the trial court against petitioner when, upon reading the instructions to the jury, he repeated the peti- [fol. 18] tioner's unproved aliases several times to show that petitioner had a past criminal record, and emphasized the two different forms of First Degree Murder—"premedi-

tated design to effect the death'' and ''and while engaged in the attempt to commit the crime of robbery'' which was nothing less than the court's shotgun method of making certain that the defendant would be convicted of First Degree Murder in one way or the other.

Nevertheless, petitioner, without admitting the presence or the validity of the documents alluded to in paragraph four of respondent's return and answer, will attempt to controvert them as they are titled and enumerated therein.

1. *Original Information.* The said information respondent relies upon for assistance in repulsing petitioner's argument in this case, is an illegal, equivocal instrument designed and constructed to compel the accused to be a witness against himself in that a multitude of unproved aliases were repeated therein constantly for the invidious purpose of inflaming and prejudicing the jury as to the accused's character and social status; that the charging part of said information was designed purposely to read so that two forms of First Degree Murder could be considered in the event that some members of the jury were unable to decide the true motive for the alleged murder, i.e. ''premeditated design to effect the death'' and ''while engaged in the attempt to commit the crime of robbery,'' to which accused's counsel duly objected on the ground that the dualistically charged crime would require two defenses which counsel declared he didn't have time to prepare, owing to the fact that the information was filed on the 17th day of October, 1935, and the case set for trial for the 4th day of November, 1935, a matter of only 17 days, even though accused's counsel's motion for additional time to prepare an adequate defense to the dual charges of First Degree Murder was denied by the presiding judge. Petitioner further alleges illegality of the information in that it was not indorsed thereon with the names of the witnesses to appear for the state, some 40 or more whose names and addresses were not given to the defense as required by law, inasmuch as petitioner was denied a preliminary hearing.

[fol. 19] 2. *Special Verdict.* The special verdict referred to by respondent to support his position in this matter is null and void because it was accepted by the trial court in the absence of petitioner's counsel, thereby depriving petitioner of his legal right and privilege of determining

whether or not the said special verdict was the true will of the jury.

3. *Judgment and Sentence.* Petitioner demurs against the document respondent refers to as the "judgment and sentence" which he offers in evidence to support the return and answer to petitioner's application for a writ of habeas corpus. Petitioner contends that respondent does not possess now, nor did he ever possess a true and certified copy of the original judgment and sentence in petitioner's murder conviction now before this court on habeas corpus. Petitioner bases his contention on two letters attached hereto, which he offers in evidence here as "Exhibit 1" and "Exhibit 2" in support of petitioner's reply to respondent's return and answer.

4. *Warrant of Commitment.* Respondent did not furnish petitioner with any copies of any of these documents, and petitioner does not have in his files any such document as a "Warrant of Commitment" as respondent refers to in paragraph four of his return and answer. Therefore, petitioner does not admit that such a document exists, and objects to the use of any purported document titled "Warrant of Commitment" in this action.

5. *Prosecutor's Report.* Petitioner demurs against this three-page instrument as being of immaterial, irrelevant and unsubstantiated substance wilfully and maliciously falsified, and designed to incite, inflame and prejudice state officials against petitioner some 21 years ago. Petitioner truthfully alleges that this said document was created at the connivance of the prosecuting attorney's office for the purpose of prejudicing prison and parole authorities against petitioner as a means of delaying, if not preventing altogether, petitioner's eventual release from prison and thereby preventing him from exposing the criminal [fol. 20] means and maneuvers the prosecution employed in bringing about petitioner's conviction on a purported charge of First Degree Murder, to-wit:

1. Conspiring with a police matron of the Spokane Police department for the purpose of identifying petitioner with possession of an allegedly stolen automobile.

2. Conspiring with a clerk in a Spokane hardware store for the purpose of identifying petitioner with

the purchase of paint allegedly used in changing the color of said automobile.

3. Inducing a young high school girl to give perjured testimony in regards to identification of an automobile allegedly used in the said crime of murder.

4. Conspiring with the so-called star witness for the state to give false testimony regarding identification of petitioner at the alleged scene of the crime.

5. Conspiring with the Sheriff's office of Spokane County for the purpose of having petitioner removed from the county jail to the state penitentiary, a distance of some 150 miles, immediately following the signing of the judgment and sentence, and thereby causing an end to the negotiations between petitioner and an attorney who was considering perfecting an appeal for petitioner to the Supreme Court.

Had petitioner been allowed to appeal he would have verified to the Supreme Court the first four allegations hereabove, from the trial transcript, and would have substantiated the fifth with an affidavit of one of the Spokane County jailors.

Petitioner particularly objects to page one of the said Prosecutor's Report (the June 1st letter from the deputy prosecutor to the state parole officer, written in 1936) on the ground that the deputy prosecutor alleges that petitioner's personality makes him "a dangerous man at any and all times. His whole makeup is surly and he is antagonistic toward all tenets of society." The reason for petitioner's objection is based upon the inaccuracy of the deputy prosecutor's analysis of petitioner's character and personality, because the deputy prosecutor was not a psychiatrist, and because the only opportunity he had to form such an opinion was when petitioner, prior to the filing of the information for First Degree Murder, was being interviewed by several burly and surly detectives late one night in the Spokane City jail, in an effort to obtain a confession from petitioner to First Degree Murder.

[fol. 21] On page two of the Prosecutor's Report, the deputy prosecutor accuses petitioner of having gone to Everett, Washington, and of stealing an automobile and typewriter there, and then proceeding to Spokane where

he was alleged to have killed a druggist while attempting a robbery. The trial transcript will show *not* one bit of evidence or testimony that petitioner was ever in the City of Everett, Washington, or that he stole an automobile or a typewriter there, nor will it show one bit of evidence or testimony that petitioner killed a druggist or drug store clerk in Spokane, or that he intended or attempted a crime of robbery there.

On page three of this same prosecutor's report, the deputy prosecutor, under "Prior Record", alleges that in August, 1935, "The defendant, on his plea of guilty, was convicted of robbery with the use of firearms, Spokane County"; . . . "On August 29, 1931, defendant was convicted in Ventura, Calif., of the crime of burglary in second degree, and his term was fixed at 7 yrs. and 5 yrs., such sentences to run concurrently."

Actually, the facts in the prior record above are:

1. At no time has petitioner been convicted, or pleaded guilty to, the crime of robbery with firearms or otherwise in Spokane or Spokane County or the State of Washington.

2. On or about August 29, 1931, petitioner was convicted by a jury in Ventura County of burglary in the first degree but sentenced by the Court on second degree, with the parole board setting his time at 7 years and 5 years on each of two counts with the sentences to run consecutively, not concurrently.

Therefore, all and the whole thereof of the respondent's argument in his answer to petitioner's application for a writ of habeas corpus, is directed solely and alone to the proposition that on the face of the Original Information, Special Verdict, Judgment and Sentence, Warrant of Commitment and the Prosecutor's Report, petitioner's imprisonment is valid and brought about through the due process of law and by the equal protection of the laws as guaranteed by the State and Federal Constitutions.

[fol. 22] However, as a matter of fact, respondent has elected to ignore the gravamen of this case at bar, and that is the fact that petitioner was denied, by the trial court, his constitutional right to appeal his first degree murder conviction by the withholding of the trial transcript, without which an appeal to a higher tribunal was impossible, and, as set forth hereinbefore, said denial, in

light of the recent United States Supreme Court decision in the Griffin and Crenshaw case, was a flagrant disregard of petitioner's guaranteed rights, privileges, immunities, and equal protection of the laws as contemplated in both the Federal and Washington State Constitutions.

Wherefore, having fully replied to respondent's return and answer to the above entitled Cause, petitioner prays that the Honorable Court grants his prayer for relief from the unjust confinement as set forth in his petition for a writ of habeas corpus.

Respectfully submitted, Tom Eskridge, Petitioner pro se.

Duly sworn to by Tom Eskridge. Jurat omitted in printing.

[fol. 22a] EXHIBIT NO. 1 TO PETITIONER'S REPLY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF SPOKANE

Department No. 6

Ralph P. Edgerton, Judge.

Spokane 11,
December 19, 1952.

Mr. Tom Eskridge,
Post Office Box 520,
Walla Walla, Washington.

Re: State v. Eskridge, No. 11114

DEAR MR. ESKRIDGE:

I enclose herewith copies of the Information, Verdict, Special Verdict, and Judgment in the above case. *Incidentally, the original judgment does not appear to be in the file, but only a copy of the same. The enclosed copy is a copy of the one in the file.* (Petitioner's underscore.)

It will be sometime before any member of the Parole Board is over this way again, but when one is, I shall

try to take occasion to speak to him about your problem. However, I would suggest that Section (.92.080, RCW, probably provides the answer and governs on the question of when your sentence for murder began.

Very truly yours, (S.) Ralph P. Edgerton.

[fol. 23] EXHIBIT No. 2 TO PETITIONER'S REPLY

Re: STATE OF WASHINGTON vs. TOM ESKRIDGE

No. 11114

SPOKANE COUNTY

Office of County Clerk, and Ex-Officio of the Superior Court

Spokane 1, Washington,
December 29, 1952.

Mr. Tom Eskridge, 19590,
P. O. Box 520,
Walla Walla, Washington.

DEAR SIR:

We have your letter of December 22, enclosing American Express Company money order in the amount of $1.00, for a photostatic copy of the original Judgment, Sentence and Commitment in the above cause.

Upon examination of the file we find that the Judgment Sentence and Commitment is not the original, but a copy of the original. This is the same paper, which was sent to you on a previous order.

Should you still want a photostatic copy of this instrument kindly let us know. If not, we will return to you the $1.00 money order.

Yours very truly, Geo. E. Fallquist, County Clerk,
by (S.) D. J. Sutherland, Deputy.

DJS: lm

[fol. 24] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

MERLE R. SCHNECKLOTH, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent.

RESPONDENT'S MEMORANDUM—Filed September 20 1956

This petitioner is applying for a writ of habeas corpus on the grounds that his constitutional rights to due process of law, and equal protection were violated, because as an indigent he was denied the right to appeal. Or as he states on page 4 of his petition, "The material right of appellate review." This being brought about by the trial court's denial to furnish him with a statement of facts at state expense.

The basis of his argument is the recent decision handed down by the United States Supreme Court in *Griffin and Grenshaw* v. *Illinois*, No. 95, Oct. Term 1955, page 777.

An outline of the factors (both law and fact) involved in the Griffin case show the following:

1. The Illinois constitution does not provide for any right to an appeal.

2. An appeal can be made in Illinois by writ of error, by providing the appellate court with a bill of exceptions, or certified statement of facts of the trial proceedings.

3. Another type of appeal can be made under Post Conviction Hearing Act, wherein only constitutional questions [fol. 25] can be considered. Under this act a free transcript may be obtained to review constitutional questions only.

4. A free transcript is provided for appellate review if a death sentence is involved.

5. In all other appeals the statement of facts (called transcript in the case) must be furnished by the appealing party.

6. "The court assumed as a basis for arriving at their decision that errors were committed in the trial which would merit reversal.

The factors involved in the present application are:

1. Our state provides for a constitutional right to appeal.

2. Regardless of whether it is a capital case or not a statement of facts is available to an indigent at county expense, if in opinion of the trial judge, justice will be promoted.

3. As a basic for decision in this case we cannot assume that trial errors were committed because as stated in *State ex rel Marx v. Superior Court*, 163 Sec. 459 at page 465, "We have authority of our own in favor of the fairness of the trial and regularity of trial judge's procedure.

4. The attached transcript of which was supplied in this petitioner's attempt to mandamus the trial court to furnish a free statement of facts in our Supreme Court cause number 26088, further show:

(a) This petitioner was represented by the father and son team of Donovan and Donovan throughout his trial, up to and including the argument for a new trial and motion to arrest judgment.

(b) Petitioner applied for a free statement of facts on seven grounds which are set out in pages 14 and 15 of the attached transcript and an additional affidavit which appears at pages 27, 28, 29, 30. (They are substantially the same as some of the grounds enumerated in the present application).

[fol. 26] (c) Affidavits were supplied by the state and by one of the Donovans who represented this petitioner. A. J. Donovans' affidavit is in the attached transcript at pages 35, 36 and 37.

(d) The matter was heard on the submitted affidavits and an order entered denying the application for a free statement of facts. This order appears at page 39 of the attached transcript.

It is obvious at the beginning of argument that there are differences of factors, both in law and in fact between the present application and the *Griffin* case. In the final analy-

sis, however, regardless or in spite of these differences, the ultimate two questions that must be answered in this petition are:

1. Whether or not the effects of the *Griffin* case are retrospective if they apply to this case.

2. Whether or not this petitioners' constitutional rights of due process and equal protection were *vidated*.

It appears to the respondent that there is an apparent inconsistency in the *Griffin* case on the question of retrospective effect. The majority of the majority is silent on this point, although one of the dissenting opinions state that:

> "Mr. Justice Black's opinion is not limited to the future. It holds that a past as well as a future conviction of crime in a state court is invalid where the State has failed to furnish a free transcript to an indigent defendant who has sought, as petitioner did here, to obtain a review of a ruling that was dependent upon the evidence in his case."

The concurring opinion in effect, however, states at page 790 that, "For sound reasons; law generally speaks prospectively . . . . . It is much more condusive to recognize candidly the consideration that give prospective content to a new pro*m*ouncement of law."

In the Illinois case they were not dealing with a statute that was ruled unconstitutional but with a proce*e*dure of appellate practice that was lacking, and therefore discriminatory.

[fol. 27] The court in effect said that since adequate provision had not been provided by the State of Illinois to afford an indigent in less than a capital case an opportunity for a free statement of facts, equal protection had been violated.

The retrospective effect of the *Griffin* case can only be an issue in cases arising in Illinois or in States which have a similar appellate proce*e*dure. We can have no problem with the retrospective effect of the *Griffin* case until our own appellate proce*e*dure is ruled upon.

It has already been pointed out that our constitution provides everyone with the *right* of appeal. Our legislature has seen fit to impliment this right with the provision that even

a poor person regardless of whether it is a capital case or not, can obtain a free statement of facts if he can show the trial judge that justice will be promoted. Our system has not summarily denied the right to appeal to anyone solely because he is indigent. This was the sole basis of discrimination in the *Griffin* case, because in Illinois a capital offender could obtain a free statement of facts whereas the lesser offenders could not, except in the limited instances to review constitutional issues only.

Our legislature has provided the trial judge the discretioning balance to protect society against frivilous practices at its expense.

Was this discretionary balance abused in this case; when the trial court refused this petitioners request.

Let us look first to this petitioners grounds for a motion for new trial and arrest of judgment, found at pages 3 and 8 respectively of the attached transcript.

The petitioner alleges, (1) that he had new evidence, (2) accident and surprise, (3) errors of law occurring at the trial, (4) Misconduct of jury, (5) improper receipt of evidence by the jury, (6) the verdict was contrary to law and evidence, (7) facts stated in the information did not con- [fol. 28] stitute a crime, (8) evidence that was duplicious (10) there was a material varience between the allegation and proof. Both motions were argued by competent counsel and eventually denied by the court.

Then in his petition for a statement of facts, this petitioner alleged that he had had insufficient time to prepare a defense. He misinformed the court by stating that an attorney had been appointed for him on October 17, and he was placed on trial November 4, whereas the record shows that he had consulted with his attorney as early as September 25. Again he alleges that the information was duplicious. He alleged that he had a witness who could prove that one of the state's witnesses committed perjury. He alleged that his attorney admitted a fact of possession during the trial proceedings, alleged that his attorney failed to call certain witnesses to establish an alibi for him. He further states that he had new evidence and further witnesses to prove his innocence and that the jury disregarded many instructions.

In an additional affidavit he again alleged that the jury disregarded the evidence and laws as given by the court.

Again he alleged that his defense attorneys were not allowed sufficient time to prepare a defense or to get necessary witnesses. Again he stated that he had new evidence to prove his innocence and to prove perjury committed by certain state witnesses.

In addition an affidavit of one of the defense attorneys was supplied the court. Whether or not it was a violation of the attorney-client relationship and improper for the court to consider, it never-the-less showed that every effort was made to afford this person with adequate representation. It ended with the statement that they believed that Mr. Eskridge had received a fair trial.

In view of the foregoing facts and considerations, can it be said that equal protection was not given to both the state and this petitioner. Must it be concluded that even after [fol. 29] the trial court has twice given consideration to these allegations that a fair trial was not received especially in view of the fact that none of the allegations which could affect the merits of the case were in any way substantiated, or else were refuted by the petitioners own counsel. In spite of all this however, if this court must follow the *Griffin* case, appellate review should have been invoked because this person could not afford his own frivilous appeal.

Does the constitutional right to appeal necessarily mean that the legislature cannot fix conditions for appellate proceedure. As long as it is not discriminatory, it obviously can.

Does the right to appeal mean that the legislative power to give a trial general discretionary power, to the end that justice will be promoted, is restricted solely to the question of whether the appellant is poor or not. It is apparent from a reading of RCW 2.32.240 that no indigent appellant is prevented from making a bona fide appeal. No discretion of the judge can properly be used to prevent an appeal solely on the grounds of poverty. The only discretion that he can actually exercise is on the issue of whether justice will or will not be promoted. Or to put it another way, the only discrimination that a trial judge can exercise is *against* frivolity. This the majority opinion states is proper.

> "But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only

gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing reviews still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

There can be no possible inference from a reading of the statute that our legislature intended one class of indigent appellant a review while preventing a difference class. Nor [fol. 30] is such discrimination affected in practice. This is born out by the cases of:

In re Mason v. *Cranor*, 42 Wn (2d) 610
State ex rel Bird v. *Superior Court*, 30 Wn. (2d) 110
30 Wn (2d) 785
State ex rel Maur v. *Superior Court*, 163 Wn. 459

For obvious reasons the respondent adopts in toto that portion of Justice Burton's dissenting opinion beginning at page 799 entitled 2 Equal Protection to page 805, and gives added emphasis to the following excerpts which directly apply to the present cause.

"That is, the issue here is not the typical equal protection question of the reasonableness of a "classification" on the basis of which the State has imposed legal disabilities, but rather the reasonableness of the State's failure to remove natural disabilities. The Court holds that the failure of the State to do so is constitutionally unreasonable in this case although it might not be in others. I submit that the basis for that holding is simply an unarticulated conclusion that it violates "fundamental fairness" for a State which provides for appellate review, and thus apparently considers such review necessary to assure justice, not to see to it that such appeals are in fact available to those it would imprison for serious crimes. That, of course, is the traditional language of due process, see *Betts* v. *Brady* 316 U.S. 455,462, and I see no reason to import new substance into the concept of equal protection to dispose

of the case, especially when to do so gives rise to the all-too-easy opportunity to ignore the real issue and solve the problem simply by labeling the Illinois practice as invidious "discrimination."

. . . . . .

"It is argued finally that, even if it cannot be said to be "arbitrary," the failure of Illinois to provide petitioners with the means of exercising the right of appeal that others are able to exercise is simply so "unfair" as to be a denial of due process. I have some question whether the non-arbitrary denial of a right that the State may withhold altogether could ever be so characterized. In any event, however, to so hold it is not enough that we consider free transcripts for indigents to be a desirable policy or that we would weigh the competing social values in favor of such a policy were it our function to distribute Illinois' public funds among alternative uses. Rather the question is whether some method of assuring that an indigent is able to exercise his right of appeal is "implied" in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325, so that the failure of a State so to provide con- [fol. 31-73] stitutes a "denial of fundamental fairness, shocking to the universal sense of justice," *Betts* v. *Brady, supra.*

It is respectfully submitted that the constitutional provisions of due process and equal protection have not been violated in cause, therefore the writ should be denied.

Respectfully submitted, Don Eastvold, Attorney General, Michael R. Alfieri, Assistant Attorney General, Attorneys for Respondent.

[fol. 74] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

v.

MERLE E. SCHNECKLOTH, as Superintendent of the Washington State Penitentiary, Respondent.

ORDER DENYING PETITION—Filed September 26, 1956

The above entitled matter having come on for hearing on September 21, 1956, before Department Two of this Court, upon the petition of Tom Eskridge and the return and answer of the respondent; and the court having heard oral argument presented on behalf of respondent, and having considered all of the questions and issues raised by petitioner and found them to be without merit;

It is Ordered that the petition be, and the same is, hereby denied.

Dated September 21, 1956.

By the Court: Charles T. Donworth, Chief Justice.

[fol. 75] THE SUPREME COURT, STATE OF WASHINGTON,
OLYMPIA

Benj. T. Hart
Clerk

Archie B. Stewart
Deputy Clerk

October 3, 1956.

Mr. Tom Eskridge,
19590, P. O. Box 520,
Walla Walla, Washington.

Re—No. 33928—In the Matter of the Application for a writ of habeas corpus of Eskridge vs Schneckloth

DEAR SIR:

Judge Donworth, the Chief Justice, has directed by order that the exhibits and the papers attached to your petition be returned to you. They are enclosed.

No transcript of the arguments made in court is ever made and we are therefore not able to furnish you with the transcript of the respondent's oral argument. A copy of the order denying your petition is enclosed.

In answer to your letter of September 22d, this case has now been decided by denying the petition. It is therefore too late to traverse the respondent's memorandum except that a petition for rehearsing of the case may be made at any time within thirty days from the filing of the order denying the petition. The date of the order was September 26th.

Yours very truly, Benj. T. Hart, Clerk.

BTH: hw
Enc.

Copy to Mr. Schneckloth, Mr. Alfieri, Assistant Attorney General.

[fol. 76] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

MERLE E. SCHNECKLOTH, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent

MOTION FOR REHEARING EN BANC—Filed October 8, 1956

To the Honorable Charles T. Donworth, Chief Justice of the Above Entitled Court:

Comes now Tom Eskridge, above named petitioner, and moves the Court for an order granting him a rehearing, en banc, in the above entitled matter for the reason and upon the ground as follows:

Petitioner had no possible opportunity to challenge, deny or refute any of the charges, allegations, and untruths set forth in the Memorandum brief of respondent's return and answer because Attorney General Don Eastvold through his deputy, Michael R. Alfieri, in Olympia, Washington, acting for the respondent in this cause, delayed placing a copy of said memorandum brief in the mail for service on petitioner, until the 20th day of September, 1956, knowing full well that petitioner, acting as his own attorney in this matter and held in confinement in the state penitentiary at Walla Walla, Washington, which is a distance of some two or three hundred miles from Olympia, could not receive it until the afternoon of the 21st day of September, 1956, the date the above entitled matter came on for hearing before Department Two of this honorable Court.

For the above reason petitioner prays that the Court's previous judgment in this matter will be set aside so that

petitioner will have his rightful opportunity to reply to respondent's memorandum brief.

Tom Eskridge, petitioner pro se.

Dated this 4th day of October, 1956.

[fol. 77] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

MERLE E. SCHNECKLOTH, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent

ORDER DENYING PETITION FOR REHEARING—October 24, 1956

The court having considered the petition for a rehearing herein,

It Is Ordered that the petition be and it is hereby denied.

Dated this 24th day of October, 1956.

By the Court: Charles T. Donworth, Chief Justice.

[File endorsement omitted.]

[fols. 78-80] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

No. 26088

STATE OF WASHINGTON, Plaintiff,

vs.

Tom Eskridge, alias Thos. Jacobs, alias T. Jacobson, alias J. H. Warren, alias John Lowery, alias George Gregory, Defendant

Transcript of Record in No. 11114

Filed in Clerk's Office, Supreme Court State of Washington, April 15, 1936. Benj. T. Hart Clerk.

[fol. 81] IN SUPERIOR COURT OF SPOKANE, COUNTY

VERDICT—November 13, 1935

Case No. 11114

Verdict of Guilty of Murder in the First Degree

We, the jury in the case of

THE STATE OF WASHINGTON, Plaintiff,

vs.

TOM ESKRIDGE, Defendant

find the defendant guilty, as charged in the information.
Spokane, Washington, November 13, 1935.

C. H. Anderson, Foreman.

[File endorsement omitted.]

[fol. 82] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 11114

STATE OF WASHINGTON, Plaintiff,

vs.

TOM ESKRIDGE, alias Thos. Jacobs, alias T. Jacobson, alias J. H. Warren, alias John Lowery, alias George Gregory, Defendant

SPECIAL VERDICT—November 13, 1935

If the jury should find the defendant, Tom Eskridge, guilty of murder in the first degree as charged in the Information, the jury will answer the following question.

Question: Shall the death penalty be inflicted upon the defendant, Tom Eskridge?

Answer: No.

Dated this 13 day of November, 1935.

C. H. Anderson, Foreman.

[File endorsement omitted.]

[fol. 83] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

No. 11114

[Title omitted]

MOTION FOR NEW TRIAL—Filed November 14, 1935

Comes now the above named defendant by Donovan & Donovan, his attorneys, and moves the Court for an order granting him a new trial in the above entitled cause, for the reason and upon the grounds as follows, to-wit:

1. Newly discovered evidence, material for the defendant which he could not have discovered with reasonable diligence and produced at the trial.

2. Accident and surprise.

3. Error of law occurring at the trial and accepted to by the defendant.

4. Misconduct of the jury.

5. That the jury received evidence, papers and documents not allowed by the Court.

6. That the verdict is contrary to law and evidence.

Donovan & Donovan, Attorneys for Defendant.

Copy Received Nov. 14, 1935, Prosecuting Attorney, Spokane County, Washington.

[File endorsement omitted.]

[fol. 84] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

No. 11114

[Title omitted]

MOTION FOR AN ORDER EXTENDING TIME IN WHICH TO PREPARE AND FILE AFFIDAVITS IN SUPPORT OF MOTION FOR A NEW TRIAL—Filed November 14, 1935

Comes now the above named defendant by Donovan & Donovan, his attorneys, and moves the Court for an order granting him an extension of time of twenty (20) days in addition to the time allowed by law in which to prepare and file affidavits in support of his motion for a new trial.

This motion is based on the files and records herein and upon the affidavit annexed hereto.

Donovan & Donovan, Attorneys for Defendant.

Copy Received Nov. 14, 1935, Prosecuting Attorney, Spokane County, Washington.

[File endorsement omitted.]

[fol. 85] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

[Title omitted]

AFFIDAVIT OF W. C. DONOVAN IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO FILE AFFIDAVITS IN SUPPORT OF MOTION FOR A NEW TRIAL.

STATE OF WASHINGTON,
County of Spokane, ss.:

W. C. Donovan, being first duly sworn on oath, deposes and says: That affiant and Ambrose J. Donovan were appointed by the Court to defend the above named defendant on October 17, 1935. That the charge against the said defendant was murder in the first degree. That defendant entered a plea of not guilty on said day and that subsequently said plea was withdrawn and a motion made for an extension of time, or a continuance of the said cause until the December term of the above entitled Court, in order that the said attorneys might have sufficient time to prepare a proper and legal defense. That at the time of filing said information the State, also, filed a list of witnesses, approximately thirty-eight (38), and that subsequently the State filed a list of additional witnesses. That the said motion for a continuance was argued before the Presiding Judge of said Court and the same was denied.

[fol. 86] That the said attorneys for the defendant worked diligently during the interval betwen the denial of said motion and the day set for trial, to-wit: November 4, 1935. That because of the large list of witnesses furnished by the State and further because of the fact that the time was so short that the attorneys for the defendant herein were not able to make as complete and satisfactory investigation of all the facts surrounding the alleged crime and because of the shortness of time, they were not able to properly prepare the defense upon the charge. That from time to time during the progress of their investigation information came to them that would have been beneficial to the defendant in his preparation of the defense but because of the shortness of time allowed it was impossible

for the said attorneys to investigate fully and in some cases even partially the information that was furnished by persons who pretended to know facts that would aid the defendant in the trial and for that reason the attorneys for the defendant were compelled to go to trial without adequate and proper preparation due to the refusal of the Court to grant sufficient time for the preparation of defendant's case.

That subsequent to November 4, 1935, the day upon which the said defendant was brought into Court for trial, there has come to these attorneys information from various sources that adequately convinces them of the defendant's innocence but by reason of the necessary work in the trial of said cause the said attorneys have not been able to thoroughly investigate all or even a partial number of the witnesses that would be of value to the defendant.

That the defendant's attorneys have information that is material and necessary and that if time is granted them [fol. 87] before the argument for a new trial they will be able to furnish the Court with substantial and complete information that will exonerate this defendant from the Commission of the crime of which he was put on trial. The defendant's attorneys have used all diligence in attempting to secure all information and that the newly discovered evidence is material and a large portion of it has come to these attorneys subsequent to the submission of the cause to the jury, and that the information sought could not have been discovered by this defendant or his attorneys prior to the trial. Subsequent to the rendering of the verdict this affiant and his associate have secured information that in their opinion if presented to the Court, with proper time to complete the investigation would completely exonerate this defendant from the charge upon which he was tried.

W. C. Donovan.

Subscribed and sworn to before me this 14th day of November, 1935.

Wm. Lucht, Jr., Notary Public in and for the State of Washington, residing at Spokane.

Copy Received Nov. 14, 1935, Prosecuting Attorney, Spokane County, Wash.

[fol. 88] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

No. 11114

[Title omitted]

MOTION FOR AN ORDER IN ARREST OF JUDGMENT—Filed November 14, 1935

Comes now the defendant by Donovan & Donovan, his attorneys, and moves the Court for an order in arrest of judgment for the reason and upon the grounds:

1. That the facts as stated in the information do not constitute a crime.
2. That evidence was introduced in the case which was entirely collateral to the issues involved and excepted to by the defendant.
3. That the information is duplicious.
4. That there was a material variance between the allegations of the information and the proof adduced at the trial as to amount to an entire failure of proof at the trial.

Donovan & Donovan, Attorneys for Defendant.

Copy Received Nov. 14, 1935, Prosecuting Attorney, Spokane County, Wash.

[File endorsement omitted.]

[fol. 89] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

No. 11114

[Title omitted]

AFFIDAVIT OF LESLIE M. CARROLL IN RESISTANCE OF MOTION FOR NEW TRIAL—Filed November 21, 1935

STATE OF WASHINGTON,
County of Spokane, ss.:

Leslie M. Carroll, being first duly sworn, upon oath deposes and says: That he is a Deputy Prosecuting Attorney in and for Spokane County, Washington, and that as such

he, together with Ralph E. Foley, Prosecuting Attorney for Spokane County, Washington, has had charge of the prosecution of the above entitled case, and that of his knowledge the defense counsel, W. C. Donovan and Ambrose Donovan, were in consultation with the above named defendant with reference to the above case on or about September 25th, 1935; that supplemental and in addition to this there was an item printed in the Spokane Daily Chronicle of September 25, 1935, on page one, which reads as follows:

"*Eskridge Hires Two Attorneys*

"W. C. Donovan and Ambrose Donovan were today retained by Harry Eskridge as defense counsel at the trial in which the state will ask the death penalty for the murder of Harry J. Phillips here on July 30th.

[fol. 90] "We have a strong defense prepared and will ask the Superior Court to make a special setting for the case so that it will go to trial in October" W. C. Donovan said today. * * *

'We are anxious to go to trial as soon as possible' Mr. Donovan said * * *"

That the affiant feels that the defendant has had more than sufficient time with which to prepare his defense, and that the motion for a new trial on this ground should be denied.

Leslie M. Carroll.

Subscribed and sworn to before me this 20th day of November, 1935.

C. C. Quackenbush, Notary Public in and for the State of Washington, residing at Spokane.

Copy received this 21st day of November, 1935.

Donovan & Donovan, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 90a] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 11114

ISSUE OF LAW—Filed November 27, 1935

To the above named Defendants and to Donovan & Donovan, your attorneys.

You are hereby notified that the undersigned will on Saturday, the 30th day of November, 1935, the next regular day set apart by the rules of said Court for hearing issues of law, bring on for hearing and trial the issues of law raised by the service of the Motion for New Trial, and Motion for order in arrest of judgment.

Ralph E. Foley & Leslie M. Carroll,
Attorneys for Plaintiff.

Due service hereof is admitted this 27th day of November, 1935.

Donovan & Donovan, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 91] IN THE SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

No. 11114

[Title omitted]

ORDER DENYING MOTION FOR NEW TRIAL AND MOTION FOR AN ORDER IN ARREST OF JUDGMENT—November 29, 1935.

On this 29th day of November, 1935, this cause came regularly on for hearing by the Court on Defendant's Motion for New Trial and Motion for an order in arrest of Judgment, and after hearing said Motion and the argument of counsel

and the Court being fully advised in the premises, it is by the Court—

Ordered, That said Motion be, and the same is hereby Denied Defendant excepts, and exception allowed.

Done in open Court this 29th day of November, 1935.

Fred H. Witt, Judge.

Attorney Ralph E. Foley and Leslie M. Carroll, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 92] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

Case No. 11114

THE STATE OF WASHINGTON, Plaintiff,

vs.

TOM ESKRIDGE, Defendant.

JUDGMENT, SENTENCE AND COMMITMENT UPON VERDICT OF GUILTY—December 14, 1935.

PENITENTIARY

On this 14th day of December 1935, the above named defendant came into open Court for pronouncement of judgment and sentence, and being asked by the Court if he had any legal cause to show why judgment of this Court should not be pronounced in his case, he makes his statement, the defendant being represented by his counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Murder in first Degree, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant be punished by

confinement at hard labor in the Washington State Penitentiary, for a term of his natural life, and shall pay the costs of this prosecution taxed at $416.05.

That said defendant shall stand committed to said institution until this sentence is complied with.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 14th day of December, 1935.

Fred H. Witt, Judge.

[File endorsement omitted.]

[fol. 93] In Superior Court, State of Washington,
County of Spokane Court Journal.

[Title omitted]

Journal Entry of Oral Notice of Appeal—
December 14, 1935

* * * * * *

Defendant gave oral notice of Appeal to the Supreme Court.

Fred H. Witt, Judge.

[fol. 94] IN SUPERIOR COURT OF SPOKANE COUNTY

Criminal #11114

STATE

vs.

ESKRIDGE

Letter from Defendant Requesting Transcript—Filed January 2, 1936

In Replying Refer to No. 16223

P.O. Box 520
Walla Walla, Wash.
December 30, 1935.

Honorable Fred H. Witt, Judge,
Superior Court of Spokane County,
Spokane, Washington.

DEAR SIR:

An article appeared in the Spokesman Review December 22, 1935 stating that my mother had raised the money to finance the appeal of my case to the State Supreme Court. That is entirely untrue as Mr. M. E. Mack, an attorney there can tell you.

The reasons I want the Supreme Court to grant me a new trial are as follows:

1. I did not have time enough to prepare a proper defense. The state appointed my attorneys October 17, 1935 and my trial commenced November 4, 1935.

2. The Information was duplicious where as it was likely that the jury was divided as to whether defendant was guilty of murdering Mr. Phillips with a premeditated dezign to effect his death or that the defendant was guilty of murdering Mr. Phillips while attempting to committ the crime of robbery. There was not one bit of evidence presented at my trial to even presume that I was guilty of either charge.

3. An eye-witness was *araible* to me to prove that at least one of the state's witnesses committed perjury on the

witness stand but my attorney absolutely refused to call that witness in my behalf.

4. One of my attorneys Mr. W. C. Donovan, in his argument to the jury said "We admit that the defendant had possession of that car."

[fol. 95] 5. My attorneys refused to call witnesses residing in Spokane that could have truthfully testified to my where-a-bouts at the time Mr. Harry J. Phillips met his death. And also they failed to call highly reputed persons from Seattle and Walla Walla, Wash. who would have testified in my behalf.

6. I have discovered new evidence and more witnesses to prove my innocence of the crime that I have been convicted of.

7. The jury disregarded many of your instructions to them.

You said when you sentenced me, that there was no doubt whatsoever in your mind that I was the man that killed Mr. Phillips. If such is the case is there any doubt as to whether it was murder and as to the degree?

I hope you will consider this letter and grant me a transcript of all the records in my case and have it delivered to me here.

Yours truly, Thomas Eskridge.

[File endorsement omitted.]

[fol. 96] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 11114

[Title omitted]

MOTION RESISTING APPLICATION FOR A TRANSCRIPT AT EXPENSE OF SPOKANE COUNTY—Filed January 2, 1926

Comes now the prosecuting attorney in and for Spokane County, Washington, by his deputy, Leslie M. Carroll, and moves the Court for an order denying the application for transcript at the expense of Spokane County in the above

entitled matter. This motion is based upon the records and files herein and the affidavit hereto attached.

Leslie M. Carroll, Deputy Prosecuting Attorney.

STATE OF WASHINGTON,
County of Spokane, ss:

Leslie M. Carroll, being first duly sworn, on oath deposes and says: That he is a deputy prosecuting attorney in and for Spokane County, Washington, and as such has had charge of the prosecution of the above entitled case; that the above named defendant was accorded a fair and impartial trial, and in his opinion no grave or prejudicial errors occurred therein, and that the ends of justice would not be served by the granting of an application for a transcript of the record at the expense of Spokane County; that the jury found the defendant guilty of murder in the first [fol. 97] degree and imposed a sentence of life imprisonment; that it is believed that Spokane County is not justified in incurring the expense of getting out a transcript in this case; that the matter of appeal is not a matter of right, but a pure matter of discretion.

Leslie M. Carroll.

Subscribed and sworn to before me this 2nd day of January, 1936.

C. C. Quackenbush, Notary Public in and for the State of Washington, residing at Spokane.

[File endorsement omitted.]

[fol. 98] IN THE SUPERIOR COURT OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

(Case #11,114)

[Title omitted]

December 30, 1935.

PAUPER OATH OF THOMAS ESKRIDGE—Filed January 2, 1936

STATE OF WASHINGTON,
County of Walla Walla, ss.:

I, Thomas Eskridge, being first duly sworn on oath, depose and say: that I am the above named defendant; that I have no property, either real or personal; no money or funds with which to secure a transcript of the evidence in said case, or an abstract of the record thereof; and have no means of providing the same; and for that reason I make this pauper oath.

I believe that I have just and sufficient grounds for an appeal in said case, and desire to perfect such an appeal.

Respectfully submitted, Thomas Eskridge, Defendant

AFFIDAVIT

The defendant, Thomas Eskridge, first being duly sworn, says that the above statement is his and to the best of his belief is true

P. E. Mahoney, Notary Public in and for the State of Washington, at Walla Walla, Washington
(Seal)

File endorsement omitted.

[fol. 99] IN SUPERIOR COURT OF SPOKANE COUNTY

January 3rd, 1936.

Tom Eskridge,
Walla Walla,
Washington

DEAR SIR:

Your application supported by your affidavit for an order requiring a Statement of Facts or transcript to be furnished in your appeal at the expense of the County was filed and the prosecutor notified thereof. The prosecuting attorney filed a motion resisting your application, a copy of which I am herewith enclosing.

I am writing to inquire whether you want the Court to fix a definite time for a hearing on your applicaiton or whether you want the Court to pass upon it without any further hearing. If you decide on the former, I will immediately fix a date and let you know.

Respectfully yours, Fred H. Witt, Judge.

[File endorsement omitted.]

[fol. 100] IN SUPERIOR COURT OF SPOKANE COUNTY

No. 11114

In Replying Refer to No. 16223

P. O. Box 520,
Walla Walla, Wash.
January 7, 1936.

Honorable Fred H. Witt, Judge,
Superior Court Spokane County,
Spokane, Washington.

DEAR SIR:

In reply to your letter of January 3, 1936, I wish to state that I have no attorney nor funds with which to procure one.

I request that you fix a definite time for a hearing on my application for Spokane County to furnish me with a transcript of my case. Also, I request that you order me to be returned to Spokane that I may appear at the hearing in my own behalf.

I don't believe that it is possible for me to explain fully, by correspondence, why Spokane County, should pay the cost of the transcript and also explain why I think that I am entitled to a new trial.

Respectfully yours, Thomas Eskridge.

[Filo endorsement omitted]

[fol. 101] (Postage Stamps 18 cts.)

——Ten Days to
——Box 520
——Walla, Wash.
——as Eskridge.

Registered 5560

Registered 3093

Honorable Fred H. Witt, Judge, Superior Court, Spokane, Wash.

(On back of envelope appear the following Post Marks):

Walla Walla, Wash., Jan. 8, 1936, Registered. Walla Walla, Wash., Jan. 8, 1936, Registered. Spokane, Wash., Jan. 9, 1936, Registered. Spokane, Wash., Jan. 9, 1936, Registered.

[fol. 102] IN SUPERIOR COURT OF SPOKANE COUNTY

No. 11114.

January 10th, 1936.

Tom Eskridge,
P.O. Box 520,
Walla Walla, Washington.

No. 16223

DEAR SIR:

I acknowledge receipt of your letter of January 7th.

I have fixed the date of January 20th, 1936, at 9:30 A.M. as the time for hearing on your application to have a Statement of Facts on your appeal furnished at the expense of Spokane County.

This hearing does not require your personal presence. You may be represented by an attorney or may present all your evidence by furnishing affidavits in support of your application.

Your request, therefore, that I make an order returning you to Spokane County is denied.

Respectfully yours. Fred H. Witt, Judge.

[File endorsement omitted.]

[fol. 103] IN SUPERIOR COURT OF SPOKANE COUNTY

In Replying Refer to No. 16223

P. O. Box 520,
Walla Walla, Wash.
January 15, 1936.

Honorable Fred H. Witt, Judge,
Superior Court of Spokane County,
Spokane, Washington.

DEAR SIR:

I acknowledge receipt of your letter of January 10th, 1936 and in reply, I am enclosing an affidavit in support of my application for a transcript of my case, to be furnished at the expense of Spokane County.

I hope you will consider this affidavit carefully and also the fact that the prosecution failed to prove any of the alleged facts or elements of crime charged in the information, with the possible exception, however, the fact that Mr. Phillips did die from a gun shot wound on or about the 30th day of July, 1935 in Spokane County.

You sentenced me December 14, 1935, and said to me then, that there was no doubt in your mind but that I was the man that killed Mr. Phillips. I do think though, that you arrived at such a firm conviction by believing the word of the police officers and the word of the Prosecuting Attorney and his deputy rather than just my simple denial.
[fol. 104] Of course I understand now that, that would be natural for any man in your position, but at the time I was placed on trial, November 4th, 1935, I was under the impression that it was not necessary that I prove myself innocent but that the State was compelled to prove me guilty, if I was guilty, beyond a reasonable doubt.

If you, the police officers and the prosecuting attorney beleive me guilty of the crime charged in the Information, each of you also belgive that I should suffer the death penalty. Therefore, if I can secure a transcript of my case, I will get a new trial and at that trial I will prove myself innocent of the crime charged beyond *all* doubt or else the State will have a greater opportunity to prove me guilty.

The jurors at my trial swore on their oath that they did not object to inflicting the death penalty on a conviction of murder in the first degree if it was gained from direct or circumstanial evidence. Neither I nor my counsel asked for sympathy or mercy and if I am not entitled to justice the taxpayers of this State are. As I am only thirty one years of age and beleive myself capable of serving thirty or thirty-five more years in this prison, it would be much less expense to the taxpayer to pay for a transcript and a new trial for me, whereas, I would be found guilty and sentenced to hang or else completely exonorated.

I am writing this letter simply for the reason that I want myself and the taxpayers of the State of Washington to [fol. 105] have justice which, I trust, we would have if it was entirely left to you.

I am not a habitual criminal though you may have in your possession papers and letters suggesting that I am.

In a recent letter from my Mother she informed me that she was unable to help me financially.

Respectfully yours, Thomas Eskridge.

[File endorsement omitted.]

[fol. 106] (Envelope)

If not delivered in 10 days Return to P.O. Box 520 Walla Walla, Washington. Thomas Eskridge.

Postage Stamps 21 cts.

Registered.
Registered 3206

Registered 735C

Registered.
Fred H. Witt, Judge, Superior Court, Spokane, Wash.

(On back of envelope, postmarks as follows):

Walla Walla, Wash., Jan. 16, 1936, Registered. Walla Walla, Wash., Jan. 16, 1936, Registered. Spokane, Wash., Jan. 17, 1936, Registered.

[fol. 107] IN THE SUPERIOR COURT OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

Criminal Case No. 11114

[Title omitted]

AFFIDAVIT IN SUPPORT OF REQUEST OF TRANSCRIPT OF EVIDENCE AND ABSTRACT OF THE RECORD FOR APPEAL, AND MOTION THEREFORE—Filed January 17, 1936

STATE OF WASHINGTON,
County of Walla Walla, ss:

I, Thomas Eskridge, being first duly sworn on oath, depose and say: That I am the defendant in the above named action; that I was found guilty of the charge upon

which said action was brought on the 4th day of November, 1935, or thereabouts; that shortly thereafter my motion for a new trial in said action was denied by Judge Fred H. Witt, the presiding judge in said action; that I desire to appeal from said verdict and judgment and from the refusal of aforesaid presiding judge to grant a new trial therein.

That I am not guilty of said charge and have adequate and substantial grounds for a reversal of said judgment, and if granted a new trial will be able to establish my innocence of said charge. That I have shown by my affidavit heretofore filed in the above entitled action that I am without funds, property, or means of any kind with which to secure a transcript of the evidence and/or an abstract of the record thereof.

That the grounds for said appeal are as follows:

1. Disregard of the evidence adduced at said trial, and of the law as laid down by the Court in the instructions, by [fol. 108] the jury, showing passion and prejudice; and that said verdict was rendered on such passion and prejudice and not upon the law and evidence in said case. That in particular said jury disregarded the law as laid down in the following instructions, and portions thereof: to-wit:

Number	2	Instruction,	Paragraph	2.
"	3	"	"	1
"	4	"	"	1
"	5	"	"	2, 3
"	8	"	"	1, 2, 3, 4
"	11	"	"	1, 2, 3
"	12	"	"	1
"	14	"	"	1, 2, 3

2. Refusal of the presiding judge to grant defendant and his attorneys, appointed by the court, sufficient time in which to prepare this affiant's defense, and in this connection affiant alleges the facts to be as follows, to wit: that he never at any time employed said Ambrose J. Donovan and W. C. Donovan as his attorneys, and did not go into the facts of his defense thereto until after their appointment as his attorneys by the Court on the 17th day of October, 1935. That affiant was placed on trial November 4th, 1935. That in a certain affidavit in resistance of affiant's motion

for a new trial, one Leslie M. Carroll, Deputy Prosecuting Attorney in and for Spokane County, State of Washington, sets forth an extract from the Spokane Daily Chronicle of September 25th, 1935; which article purported to say [fol. 109] that said Donivan and Donivan has been retained by affiant as attorneys for his defense in said cause, but did not set out that an article appeared in the Spokesman Review, a newspaper also published in said City of Spokane, subsequent to aforesaid article in the Chronicle and prior to said October 17th, 1935; stating:

"Eskridge refuses to talk to own attorneys . . . ." That the facts in respect to this matter were and are as heretofore alleged; namely that said attorneys never were employed by affiant and that affiant never discussed the facts of his defense to said charge prior to their appointment by the Court, October 17th, 1935.

In this connection affiant refers to the affidavit of one of the said attorneys, namely W. C. Donivan, dated the 14th day of November, 1935; the same being in support of motion for extention of time to file affidavit in support of motion for new trial which affidavit is on file in this case and is hereby referred to and by reference made a part hereof as fully as though set out herein.

That in order to establish the innocence of affiant to said charge, it was necessary for affiant to contact various witnesses in Seattle and Walla Walla Washington, and Umatilla and Portland, Oregon, and to secure their presence at said trial: that the testimony of said witnesses, if they could have been secured by affiant, would have established the innocence of affiant to said charges. That by reason of the short time given defendant and his attorneys for the preparation of his defense, and the refusal of the Court to set over said trial until December, 1935 as duly requested by affiant, made it impossible for affiant to secure such wit- [fol. 110] nesses and to have a fair trial as was his constitutional right under the Constitution of the State of Washington.

3. Newly discovered evidence, material to affiant's defense, which could not with reasonable diligence have been discovered prior to the trial of the affiant, will show that affiant was not in the vicinity where the alleged crime was

committed at the time that the same was committed; and that the same will be testified to by reputable citizens who saw and identified affiant at points wid-ly removed from the scene of said crime at the time the alleged crime was committed.

4. That certain of the evidence given by certain of the witnesses on oath for the State at the trial of the affiant was false and untrue, and known to be so false and untrue by said witnesses at the time of testifying to the same. That upon a new trial affiant will be able to produce evidence to establish the fact that such perjury was committed by certain of said witnesses. That said false and untrue statements of said witnesses were so made by them respecting certain material facts and issues in said case.

Thomas Eskridge, Defendant.

Subscribed and sworn to before me this 15th day of January, 1936.

P. E. Mahoney, Notary Public in and for the State of Washington, residing at Walla Walla. (Seal.)

[fol. 111] MOTION

Comes now the above named defendant and moves the Court for an Order directing the County of Spokane, State of Washington, and the County Commissioners thereof to furnish to the defendant in the above named and entitled case, being Criminal Case #11714, in the records and files of the above entitled Court without cost to said defendant.

This motion is based upon the above and foregoing affidavit, and upon all the records and files in said case.

/ Thomas Eskridge, Defendant in propria persona.

[File endorsement omitted.]

[fol. 112] In The Superior Court of The State of Washington in and for the County of Spokane

No. 11114

[Title omitted]

Motion and Affidavit of Leslie M. Carroll Resisting Request for Transcript of the Record for Appeal—Filed January 20, 1936

Comes now Ralph E. Foley, Prosecuting Attorney in and for Spokane County, Washington, by his deputy Leslie M. Carroll, and moves the Court, Judge Fred H. Witt presiding, for an order denying the request of the defendant for a transcript of the record in the above entitled case at the expense of Spokane County, Washington.

This motion is based upon the records and files herein and the affidavit of Leslie M. Carroll hereto attached.

Leslie M. Carroll, Deputy Prosecuting Attorney.

[File endorsement omitted.]

[fol. 113] State of Washington,
County of Spokane, ss:

Leslie M. Carroll, being first duly sworn, on oath deposes and says: That he is a Deputy Prosecuting Attorney in and for Spokane County, Washington, and as such in charge of the above entitled case; that the defendant received a fair and impartial jury trial and that the jury before rendering its verdict had the instructions of the Court and rendered a verdict based on the evidence from the witness stand and the instructions as given by the Court; that the defendant was in consultation with Attorneys W. C. Donovan and Ambrose Donovan with reference to the above case on or about September 25, 1935; that there was printed an item in the Spokane Daily Chronicle on September 25, 1935 on page one, which reads as follows:

"W. C. Donovan and *Ab*rose Donovan were today retained by Harry Eskridge as defense counsel at the

trial in which the state will ask the death penalty for the murder of Harry J. Phillips here on July 30th.

" 'We have a strong defense prepared and will ask the Superior Court to make a special setting for the case so that it will go to trial in October,' W. C. Donovan said today.* * * * * * *

" 'We are anxious to go to trial as soon as possible,' Mr. Donovan said. * * *"

Affiant feels that the defendant has had more than sufficient time in which to prepare his defense and affiant further attaches to and makes a part of this motion an affidavit by Ambrose Donovan, one of the defense [fol. 114] attorneys, which indicates that defendant's counsel did everything which counsel should do to protect defendant's interests in the case.

Affiant further states and it is verified by affidavit of defendant's counsel that had the defendant any witnesses who would prove him elsewhere than in Spokane, Washington on July 30th, 1935 that he had ample and sufficient time to subpoena those witnesses, but that he did not do so; that there is no evidence of perjury by witnesses committed at the trial of the defendant.

Affiant further states that justice would not be promoted by furnishing the defendant with a free statement of facts to be made by the official court reporter and paid for by the County Treasurer in that the defendant has been accorded a fair and impartial trial and in affiant's opinion no grave or prejudicial errors occurred therein.

Affiant further states that the defendant on numerous occasions before the Superior Court of this County and State stated that he was an heir to certain property in the State of Virginia and should be made to use this property if he wishes to appeal.

Affiant further states that the matter of appeal is not a matter of right, but a pure matter of discretion of the Court.

Leslie M. Carroll.

Subscribed and sworn to before me this 20th day of January, 1936.

C. C. Quackenbush, Notary Public in and for the State of Washington, residing at Spokane.

[fol. 115] No. 11114

AFFIDAVIT OF A. J. DONOVAN

STATE OF WASHINGTON,
County of Spokane, ss:

A. J. Donovan, being first duly sworn, on oath deposes and says: That he was one of the two attorneys appointed by the court to defend Thomas Eskridge in the case of the State of Washington vs. Thomas Eskridge, defendant, Case No. 11114, which was tried in the superior court, Spokane County, on the 4th day of November, 1935, and continuing until the 13th day of November, 1935.

That prior to the arraignment of the said defendant and while he was being held in the city jail some time before the 25th of September the said Eskridge called this affiant to the city jail to take up the matter of his defence. That this affiant and his associate, W. C. Donovan, consulted with the said Eskridge several times subsequent to the date of his return and prior to the arraignment and no information relative to his defence was given at any time up to the time of his arraignment. That at one time he informed the affiant that money would be forthcoming for his defence and that shortly thereafter this affiant was informed that it [fol. 116] would be impossible for the defendant to raise money and he inquired as to whether or not the court would appoint a lawyer to defend him. Upon being told that the court would appoint an attorney he requested that this affiant and his associate take the case upon the court's appointment and this was done.

During these various consultations the defendant informed this affiant and his associate that he wanted a speedy trial and that 10 days was sufficient time in which to prepare for the said trial and that all information necessary for his defence would be given 10 days before the trial.

That the defendant entered a plea of "Not Guilty" as charged in the information to the crime of first degree murder and that shortly thereafter the court permitted his withdrawal of that plea in order that certain motions might be made and argued against the information. Said motions were made and argued, and denied approximately 10 days before the beginning of the trial.

That the defendant at all times refused, to give his attorneys any information upon which they might base the defence and that whatever defence was imposed was done without the cooperation or help of the defendant. That the only two witnesses suggested in Spokane by the defendant were the owner of the Golden Gate Cafe and an assayer whose place of business is on Sprague Avenue between Stevens and Washington Street. That this affiant interviewed those witnesses in the hope of establishing proof of the defendant's innocence and both witnesses were unable to be of any assistance.

That the witnesses referred to in Portland and Seattle from the information given this affiant and his associate could have no knowledge bearing on the case and their [fol. 117] testimony would have been without merit although this affiant endeavored to locate a service station employee in Portland whose name was not divulged and therefore this affiant has no knowledge as to what his testimony might have been.

That this affiant and his associate did everything in their power to protect the rights of said Eskridge and that it is the belief of this affiant that he had a fair trial.

A. J. Donovan.

Subscribed and sworn to before me on this 20th day of January, 1936.

C. C. Quackenbush, Notary Public for the State of Washington.

[fol. 118] IN SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

#11114

January 20th, 1936.

Tom Eskridge,
Box No. 520,
Walla Walla, Washington.

No. 16223.

DEAR SIR:

The hearing on your application that you be furnished a transcript at the expense of Spokane County was held today and the application denied for the reasons stated in the Order which was signed, a copy of which is herewith enclosed.

Respectfully yours, Fred H. Witt, Judge.

Enc.o.

[fol. 119] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

No. 11114

[Title omitted]

ORDER DENYING APPLICATION FOR TRANSCRIPT AT EXPENSE OF SPOKANE COUNTY—January 20, 1936

This matter came regularly on for hearing in open court on this 20th day of January, 1936, upon the application of the defendant for an order requiring a transcript on appeal to be furnished at the expense of Spokane County; and said application being heard upon the affidavit of the defendant and the counter-affidavits upon the part of the State; and the Court considering all the affidavits and being fully advised in the premises, it is

Ordered, That the application for transcript at the expense of Spokane County be, and is, hereby denied, for the reason that in the opinion of the Court, justice would not be promoted by furnishing the defendant with a free Statement

of Facts to be made by the Official Reporter and paid for by the county treasurer, in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occured therein.

Done in Open Court this 20th day of January, 1936.

Fred H. Witt, Judge.

[File endorsement omitted.]

[fol. 120] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF SPOKANE

No. 11114

[Title omitted]

CERTIFICATE TO TRANSCRIPT—March 24, 1936

STATE OF WASHINGTON,
County of Spokane, ss:

I, Frank C. Nash, County Clerk, and Clerk of the Superior Court of the State of Washington, for the County of Spokane, do hereby certify that the foregoing is a full, true and correct Transcript of so much of the record and files in the above entitled cause as I have been directed by the Prosecuting Attorney of Spokane County to transmit to the Supreme Court of the State of Washington.

In witness whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 24th day of March, A.D. 1936.

Frank C. Nash, Clerk, By E. E. Burton, Deputy.
Seal Superior Court, Spokane County Washington.

[fol. 121] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26088

STATE OF WASHINGTON, Plaintiff

vs.

TOM ESKRIDGE, alias Thos. Jacob , alias T. Jacobson, alias J. H. Warren, alias John Lowery, alias George Gregory, Defendant.

Spokane County No. 11114

STATE OF WASHINGTON,
County of Thurston, ss:

I, Robert Holstein, Clerk of the Supreme Court of the State of Washington do hereby certify that the attached and foregoing is a full, true and correct copy of the Transcript of Record and the whole thereof, as the same was filed in the above entitled case on the 15th day of April, 1936, and now appears of record and on file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 28th day of October, 1957.

Robert Holstein, Clerk of the Supreme Court, State of Washington. (Seal.)

[fol. 122] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26088

STATE OF WASHINGTON, EX REL. THOMAS ESKRIDGE

vs.

FRED H. WITT, Judge of the Superior Court of the State of Washington in and for Spokane County

MOTION FOR WRIT OF MANDATE--Filed February 14, 1936

STATE OF WASHINGTON,
County of Walla Walla:

Comes now the above entitled Relator, Thomas Eskridge, and moves the Court that a Writ of Mandate be duly issued out of the above entitled Court directed to Judge Fred H.

Witt of the Superior Court of the State of Washington in and for Spokane County; directing and requiring him to Order Spokane County and its proper officers, to furnish to the above entitled Relator, without cost to himself, a transcript of the evidence and an abstract of the record in that certain criminal cause heretofore tried in said Superior Court in and for the State of Washington known as State of Washington, Plaintiff vs. Thomas Eskridge, defendant, being criminal cause No. 11,114 in the files of the Clerk of said Court.

This motion is based upon the affidavit of said Relator and his petition under oath; both of which are attached hereto.

Thomas Eskridge, Relator, in propera persona

[fol. 123] No. 26088

AFFIDAVIT OF THOMAS ESKRIDGE IN SUPPORT OF MOTION FOR WRIT OF MANDATE—Filed February 14, 1936

STATE OF WASHINGTON,
County of Walla Walla:

I, Thomas Eskridge, being first duly sworn on oath, depose and say: That I was the defendant in that certain cause known as State of Washington, Plaintiff, vs. Thomas Eskridge, Defendant (Criminal Cause No. 11,114) which was tried in the Superior Court of the State of Washington in and for Spokane County; before Judge Fred H. Witt, presiding judge; on or about the 4th day of November, A. D. 1935; which trial resulted in a verdict of guilty with a recommendation of clemency, to the charge of Murder in the first degree. That shortly thereafter my motion for a *new* trial in said cause duly made was denied by said Judge Fred H. Witt.

That I am not guilty of said charge and have adequate and substantial grounds for a reversal of said judgment and if granted a new trial thereof will be able to establish my innocence of said charge. That I desire to appeal from said verdict and judgment and from the refusal of aforesaid Presiding Judge to grant a new trial thereof; that as I

have shown by my affidavit, heretofore filed in the above mentioned cause, being criminal cause No. 11,114 of the Superior Court in and for Spokane County; that I am without money, funds, or property of any kind and have no means of securing the samewith which to secure a transcript of the evidence and/or an abstract of the record of said cause.

[fol. 124] That after the denial for said motion for a new trial, Affiant duly moved said Court for an order compelling Spokane County to furnish Affiant with a transcript of said evidence and an abstract of said record so that Affiant might appeal from said verdict and judgement; which motion was denied. That Affiant is still without funds, money, or property of any description and is unable to secure the same with which to secure said transcript of evidence and abstract of the record in said cause and is thereby unable to perfect Affiant's appeal from said verdict and judgement and Affiant will thereby be deprived of his constitutional rights to a fair and impartial trial of said charge.

That Affiant did not have a fair and impartial trial of said charge, for the following reasons:

1. Disregard of the evidence adduced at said trial, and of the law as laid down by the Court in the instructions, by the jury, showing passion and prejudice; and that said verdict was rendered on such passion and prejudice and not upon the law and evidence in said case. That in particular said jury disregarded the law as laid down in the following instructions, and portions thereof: to wit:

Number	2	Instruction,	Paragraph	2.
"	3	"	"	1
"	4	"	"	1
"	5	"	"	2, 3
"	8	"	"	1, 2, 3, 4
"	11	"	"	1, 2, 3
"	12	"	"	1
"	14	"	"	1, 2, 3

2. Refusal of the presiding judge to grant defendant and his attorneys, appointed by the Court, sufficient time in which to prepare this affiant's defense, and in this connec-

tion affiant alleges that the facts are as follows, to wit: That he never at any time employed said Ambrose J. Donovan and W. C. Donovan as his attorneys, and did not [fol. 125] go into the facts of his defense thereto until after their appointment as his attorneys by the Court on the 17th day of October, 1935. That Affiant was placed on trial November 4th, 1935.

That in order to establish the innocence of Affiant to said charge, it was necessary for affiant to contact various witnesses in Seattle and Walla Walla, Washington, and Umatilla and Portland, Oregon, and to secure their presence at said trial; that the testimony of said witnesses, if they could have been secured by affiant, would have established the innocence of affiant to said charges. That by reason of the short time given defendant and his attorneys for the preparation of his defense, and the refusal of the Court to set over said trial until December, 1935, as duly requested by affiant, made it impossible for affiant to secure such witnesses and to have a fair trial as was his constitutional right under the Constitution of the State of Washington.

3. Newly discovered evidence, material to the affiant's defense, which could not with reasonable diligence have been discovered prior to the trial of the affiant, will show that affiant was not in the vicinity where the alleged crime was committed at the time the same was committed: and that the same will be testified to by reputable citizens who saw and identified affiant at points wid-ly removed from the scene of said crime at the time the alleged crime was committed.

4. That portions of the evidence given by certain of the witnesses on oath for the State at the trial of the affiant was false and untrue, and known to be so false and untrue by said witnesses at the time of testifying to the same. That upon a new trial affiant will be able to produce evidence to establish the fact that such perjury was committed by certain of said witnesses. That said false and untrue statements of said witnesses were so made by them respecting certain material facts and issues in said case.

That if furnished said transcript of evidence and abstract of the record, Affiant will prosecute said appeal in his own behalf.

[fol. 126] That by reason of the limited time provided by law for appeal, Affiant has no plain, speedy and adequate remedy at law.

Thomas Eskridge, Affiant.

Subscribed and sworn to before me this 11th day of February, A.D. 1936.

P. E. Mahoney, Notary Public in and for the State of Washington, residing at Walla Walla.

My commission expires September 10, 1936.

[fol. 127] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26088

[Title omitted]

PETITION FOR WRIT OF MANDATE—Filed February 14, 1936

Comes now Thomas Eskridge, the above entitled Relator, and shows and petitions the Court as follows:

I

That said Relator was the defendant in the case of State of Washington vs. Thomas Eskridge, being criminal cause No. 11,114 of the Superior Court of the State of Washington in and for Spokane County, That said trial being had before a jury in said court, Judge Fred H. Witt presiding; said trial was had about a charge of Murder in the first degree, which resulted in a verdict of guilty with a recommendation for clemency. That thereafter said judge duly sentenced said defendant, the Relator herein to the Washington State Penitentiary at Walla Walla.

That Relator duly moved for a new trial of said charge and that the same was thereafter denied by said judge.

II

That the Relator at the time of his arrest for said crime, at all times since, and now, is without any money, funds, or

property of any description with which to secure counsel to assist him in the defense of said charge at said trial; and/or to secure a transcript of the evidence and an abstract of the record therein, and the assistance of counsel to prosecute and appeal on said conviction; and he has no means of securing the same; as shown by his affidavit on file with the Clerk of said Superior Court in and for Spokane County in said criminal cause No. 11,114.

[fol. 128] That Relator duly moved said Court for a transcript of said evidence at the expense of Spokane County; which motion was based upon affidavit of Relator filed therewith, setting forth the fact that said Relator did not have a fair and impartial trial of said charge of Murder in the first degree; and further setting forth errors in law and in fact which occurred at and prior to said trial; prejudicial to the rights of this Relator; which grounds were substantial and adequate, and entitled Relator to a reversal of said verdict and judgement and a new trial thereof.

That said motion was denied by said Judge Fred H. Witt. That by reason of such denial and the lack of funds Relator will be denied his constitutional rights to a fair and impartial trial of said charge of Murder in the first degree unless the above entitled Court shall cause to be issued from it to said Judge Fred H. Witt, its Writ of Mandate; ordering and directing said Judge Witt to make an order directing and requiring said County of Spokane, without cost to Relator, to deliver to him a transcript of the evidence of said trial and an abstract of the record thereof.

III

That if the Relator can secure from Spokane County without cost to himself a transcript of the evidence in said case and the abstract of the record thereof, he will be thereby enabled, acting in his own behalf, to prosecute his appeal from said verdict and judgement of guilty of said charge of Murder in the first degree. That Relator has set forth in his affidavit attached hereto, and marked Exhibit A, his grounds for such appeal, and claim of reversable error prejudicial to his defense occurring at and prior to said trial, which affidavit is hereby referred to, and by

reference made a part hereof as fully as though set out herein.

[fol. 129] IV

That Realator has no plain, speedy or adequate remedy at law.

Wherefore Relator prays that a hearing be had upon this, his petition, motion, and affidavit; and that upon said hearing the above entitled Court shall duly issue its Writ of Mandate ordering and compelling said Judge Fred H. Witt, Respondent, to duly make and enter an order in said criminal cause No. 11,114 of said County of Spokane to furnish to Relator a transcript of the evidence and an abstract of the record of said cause. And for such other and further relief as may be meet in the premises.

Thomas Eskridge, Relator, in propera persona.

Duly sworn to by Thomas Eskridge. Jurat omitted in printing.

[fol. 130] AFFIDAVIT OF THOMAS ESKRIDGE IN SUPPORT OF PETITION FOR WRIT OF MANDATE—Filed April 14, 1936

I, Thomas Eskridge, being first duly sworn on oath depose and say: That on or about the 10th day of August 1935, in the Superior Court of the State of Washington for Spokane County with Judge Fred H. Witt presiding, I entered a plea of guilty to a charge of grand larceny, with a promise from one Leslie M. Carroll, Deputy Prosecuting Attorney for the said Spokane County, that he would recommend to the State Board of Prison Terms and Paroles that I serve less than five years in the penitentiary at Walla Walla, Washington. The said Judge Fred H. Witt immediately sentenced me to a term of fifteen years to the said penitentiary and made a statement in open court that he would recommend to the said Board of Prison Terms and Paroles that I serve the full fifteen years and he further stated in open court that if he had his way he would see that I served every day of the fifteen years.

Subsequent to the 10th day of August 1935 I was returned to Spokane County from the State Penitentiary at Walla Walla and on the 4th day of November 1935 I was placed on trial to defend myself from a charge of first degree murder in the said Superior Court with the said Judge Fred H. Witt presiding. A week or ten days before my trial began I informed my attorneys that the said Judge Fred H. Witt had showed passion and predjudice while sentencing me on the said grand larceny charge.

Subsequent to my conviction of first degree murder and prior to the date set for the arguments of the Motion for a new trial, I requested of the said Judge Fred H. Witt in open court that the attorneys appointed by the court to [fol. 131] defend me be withdrawn from the case on the grounds that the said attorneys failed to consult me about the Motion for a new trial and that I wished to secure other counsel to argue the Motion for a new trial.

The said Judge Fred H. Witt denied my request on the grounds that, as I did not employ my attorneys it was not my legal right to discharge said attorneys.

Subsequently the said attorneys argued the Motion for a new trial over my objections as the records will show. The said Judge Fred H. Witt immediately denied the Motion there by depriving me of my constitutional rights.

Thomas Eskridge, Relator.

Subscribed and sworn to before me this 13th day of April, A. D. 1936.

P. E. Mahoney, Notary Public in and for the State of Washington, residing at Walla Walla.

[fol. 132] IN THE SUPREME COURT OF WASHINGTON

MOTION DOCKET—April 24, 1936

No. 26088

(9)

STATE EX REL. THOMAS ESKRIDGE, Relator,

vs.

FRED H. WITT, J. of Superior Court Spokane Co., Wash. State, Respondent

Attorneys: Donovan & Donovan. Ralph E. Foley, Leslie M. Carroll.

FOR WRIT OF MANDATE

Denied.

[fol. 132a] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26088

STATE EX REL. THOMAS ESKRIDGE, Relator,

vs.

FRED H. WITT, Judge of the Superior Court for Spokane County, Respondent

JUDGMENT—May 27, 1936

This cause having been heretofore submitted to the Court upon the petition of the relator for a writ of mandate commanding the respondent to enter an order to furnish the relator a transcript of the evidence and an abstract of the record in that certain cause in which the State of Washington is plaintiff and Tom Eskridge is defendant in the records of the Superior Court of the State of Washington in and for Spokane County being cause No. 11114 of said Court, and the Court having fully considered the same and filed its opinion in writing, denying the writ,

It is Ordered, Adjudged and Decreed, that the position be and the same is denied, and that the said State of Washington have and recover of and from the said Tom Eskridge the costs of this action taxed and allowed at Sixteen Dollars ($16.00), and that execution issue therefor.

And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 133] THE SUPREME COURT, STATE OF WASHINGTON,
OLYMPIA

Benj. T. Hart, Clerk. Archie B. Stewart, Deputy Clerk

January 14, 1957.

Mr. Thomas Eskridge,
No. 19590,
P. O. Box 520,
Walla Walla, Washington.

Re—No. 26088—State ex rel. Eskridge vs. Superior Court for Spokane County

DEAR SIR:

On April 24, 1936 the petition for writ of mandate was denied.

There was no transcript filed in case No. 26179—State vs. Eskridge, the Court having used the transcript furnished in the mandate case No. 26088.

I regret I am unable to lend you the transcript. The Rules of Court require me to retain all the papers in a case, except on an order of the Court.

Yours very truly, Benj. T. Hart, Clerk.

BTH/lew

[fol. 134] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26088

STATE OF WASHINGTON, EX REL., THOMAS ESKRIDGE, Relator,

vs.

FRED H. WITT, Judge of the Superior Court of the State of Washington in and for Spokane County, Respondent

STATE OF WASHINGTON,
County of Thurston, ss:

I, Robert Holstein, Clerk of the Supreme Court of the State of Washington do hereby certify that the attached and foregoing are full, true and correct copies of the Motion for Writ of Mandate, Affidavit in Support of Motion for Writ of Mandate, Petition for Writ of Mandate, Affidavit in Support of Petition for Writ of Mandate, Motion Docket Entry Denying Petition for Writ of Mandate, Judgment Entered May 27, 1936, and the whole thereof, as the same were filed and entered in the above entitled case on the 14th day of February, the 14th day of April, 1936, the 24th day of April, 1936 and the 27th day of May, 1936 respectively, and now appear of record and on file in my office, and that the denial of the petition for writ of mandate is of record in Motion Docket 8, at page 31, of the records in my office.

I further certify that the letter dated January 14, 1947, addressed to Mr. Thomas Eskridge, is a copy of the letter which was placed in the file of this case.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 30th day of October, 1957.

Robert Holstein, Clerk of the Supreme Court, State of Washington. (Seal.)

[fol. 135] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26179

STATE OF WASHINGTON, Respondent,

vs.

TOM ESKRIDGE, Appellant

AFFIDAVIT OF SERVICE OF MOTION TO DISMISS APPEAL—Filed April 15, 1936

STATE OF WASHINGTON,
County of Walla Walla, ss:

P. E. Mahoney, being first duly sworn, on oath deposes and says: that he now is and at the time of making service herein was a citizen of the United States, over twenty-one years of age, and competent to be a witness in the hearing hereof; that he resides at Walla Walla, Washington; that on the 13th day of April, 1936, at the State Penitentiary at Walla Walla, he served the annexed motion to dismiss appeal, with affidavit of Ralph E. Foley, and notice of hearing upon one Tom Eskridge, the appellant therein named, by delivering to and leaving with him personally a true, full and correct copy of said motion to dismiss appeal, with affidavit of Ralph E. Foley, and notice of hearing, certified by affiant to be a true copy of the original motion to dismiss appeal, with affidavit of Ralph E. Foley, and notice of hearing herein, and that he knew the person so served to be the same person named and described in said motion to dismiss appeal, with affidavit of Ralph E. Foley, and notice of hearing as appellant in said action.

P. E. Mahoney.

Subscribed and sworn to before me this 13th day of April, 1936.

L. E. Allen, Notary Public in and for the State of Washington, residing at Walla Walla.

[fol. 136] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26179

[Title omitted]

NOTICE OF MOTION TO DISMISS APPEAL

To the above named appellant, Tom Eskridge:

You are hereby notified that the Respondent, State of Washington, will bring on for hearing in the above entitled Court motion for dismissal of your appeal in the said cause on the next regular motion day of said Court; being Friday, April 24, 1936, at the hour of ten o'clock A.M. of said day.

Ralph E. Foley, Leslie M. Carroll, Attorneys for Respondent.

[fol. 137] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26179

[Title omitted]

MOTION TO DISMISS APPEAL

Comes now the Respondent by Ralph E. Foley, Prosecuting Attorney in and for Spokane County, Washington, and Leslie M. Carroll, Deputy, and moves the Court for an order dismissing the appeal in the above entitled cause for the reason that the appeal heretofore taken from the conviction, judgment and sentence of the trial court in said cause has not been perfected by filing in the above Court a certified statement of facts, certified transcript of record, abstract of record, and Appellant's opening brief within the statutory time, as provided by the Court in Rule 17 of Rules of Court.

This motion is based upon the records and files herein in this cause and upon the affidavit of Ralph E. Foley hereto attached and made a part hereof.

Ralph E. Foley, Leslie M. Carroll, Attorneys for Respondent.

[fol. 138] AFFIDAVIT OF RALPH E. FOLEY

STATE OF WASHINGTON,
County of Spokane, ss:

Ralph E. Foley, being first duly sworn, on oath deposes and says: That he is and at all times herein mentioned has been Prosecuting Attorney of Spokane County, Washington, and in charge of the prosecution of the above entitled cause; that the appellant, Tom Eskridge, was by information filed in the Superior Court of Spokane County, Washington, charged with the crime of murder in the first degree; that said cause came on for trial before the court and jury on the 4th day of November, 1935, and the jury on the 13th day of November, 1935 returned a verdict of guilty as charged, with a special finding that the death penalty not be inflicted; that appellant, Tom Eskridge, was represented at the trial by Attorneys W. C. Donovan and A. J. Donovan; that motions for new trial and arrest of judgment were filed and argued and that said motions were denied on the 29th of November, 1935; that thereafter counsel for appellant withdrew at appellant's request and the court granted appellant's request to defer sentence until December 4th, 1935, at which time hearing was had and the appellant requested the court to again defer sentence to December 14th, 1935, which request the court granted; that on December 14th, 1935 judgment was entered on the verdict and the appellant was thereupon sentenced to confinement at hard labor in the Washington State Penitentiary at Walla Walla, Washington for the term of his natural life; that appellant thereupon gave oral notice of appeal to the Supreme Court of the State of Washington; that appellant has failed to file in the Supreme Court a certified statement of facts, certified transcript of record, abstract of record and appellant's opening brief, and that more than sixty days have elapsed since the filing of notice of appeal on December 14th, 1935, and therefore affiant believes that under Rule 17 of Rules of Court said appeal should be dismissed

Ralph E. Foley.

Subscribed and sworn to before me this 11th day of April, 1936.

A. C. Colburn, Notary Public in and for the State of Washington, residing at Spokane.

[fol. 139] IN THE SUPREME COURT OF WASHINGTON

No. 26179

(8)

STATE OF WASHINGTON, Respondent,

vs.

TOM ESKRIDGE, Appellant.

Attorneys: Ralph E. Foley, Leslie M. Carroll.

April 16, 1936.

Motion to Dismiss

Granted.

Mr. Ralph E. Foley,
Prosecuting Attorney,
Spokane, Washington.

DEAR MR. FOLEY:

#26179—State of Washington vs. Eskridge

The motion to dismiss appeal, the affidavit of the State and motion for the motion calendar for April 24th, 1936, and an affidavit of service were filed in error yesterday in case #26088 which is the action for a writ of mandate..

These papers have been transferred to case #26179 which is the proper Number of the case.

You may arrange with the Chief Justice in regard to time allowed for the argument of these cases on the day of hearing; the cases, however, will follow each other on the calendar even thought one is a motion to dismiss and the other for a writ of mandate.

We have as yet received no transcript to be filed in case #26179. Is it your intention to furnish a transcript for this case or to use the transcript filed in the mandate case.

Yours very truly, Benj. T. Hart, Clerk.

BTH-D
CC to Mr. Eskridge

[fol. 140] IN THE SUPREME COURT OF WASHINGTON

MOTION DOCKET—April 24, 1936

No. 26179

(8).

STATE OF WASHINGTON, Respondent

vs.

TOM ESKRIDGE, Appellant.

Attorneys: Ralph E. Foley, Leslie M. Carrol.

Motion to Dismiss

Granted.

[fol. 141] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26179

STATE OF WASHINGTON, Respondent,

vs.

TOM ESKRIDGE, Appellant.

Spokane County No. 11114

JUDGMENT—May 27, 1936

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Spokane County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 27th day of May, A. D. 1936, on motion of Ralph E. Foley, Esquire, of counsel for respondent, considered, adjudged and decreed, that the appeal from the judgment of the said Superior Court be, and the same is hereby dismissed with costs; and that the said State of Washington have and recover of and from the said Tom Eskridge the costs of

this action taxed and allowed at Thirty Two and 85/100 ($32.85) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 142] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26179

STATE OF WASHINGTON, Respondent,

vs.

TOM ESKRIDGE, Appellant.

STATE OF WASHINGTON,
County of Thurston, ss:

I, Robert Holstein, clerk of the Supreme Court of the State of Washington do hereby certify that the attached and foregoing is a full, true and correct copy of the affidavit of Service, Notice of Hearing Motion to Dismiss Friday, April 24, 1936, Motion to dismiss Appeal, Letter from Benj. T. Hart, Clerk, dated April 16, 1936, Motion Docket Entry Granting Motion to Dismiss appeal, and Judgment entered May 27, 1936, and the whole thereof, as the same were filed and entered in the above entitled case on the 15th and 24th days of April, 1936, respectively, and on May 27, 1936, and now appear of record and on file in my office, and that the granting of the motion to dismiss appeal is of record in Motion Docket 8, at page 30, of the records in my office.

I further certify that the letter dated April 16, 1936, is a copy of the letter which was placed in the file of this case.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 30th day of October, 1957

Robert Holstein, Clerk of the Supreme Court, State of Washington (Seal.)

[fol. 143] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 32466

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF HABEAS CORPUS—FILED APRIL 23, 1953.

To the Honorable Chief Justice of the above entitled Court:

This is the original Motion for leave to proceed in Forma Pauperis and Petition for a Writ of Habeas Corpus of Tom Eskridge, Your Petitioner, and it very respectfully represents and shows:

I

Your Petitioner is a Citizen of the United States of America and entitled to the protection of the Fourteenth Amendment to the Constitution of the United States, but because of poverty he has been held in the Washington State Penitentiary at Walla Walla, Washington, without the benefit of redress since the Judgment and Sentence were pronounced in Cause No. 11114 of the Spokane County, Washington, files on or about the 14th day of December, 1935.

II

Your Petitioner is unlawfully imprisoned, detained, confined and restrained of his liberty by one John R. Cranor, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington.

III

That such restraint and detention is not by reason of any final order, decree, judgment of a Court of competent

jurisdiction, or by reason of any order adjudging Petitioner to be in contempt of any court, officer or other tribunal.

IV

That the cause of and/or pretense for said restraint and imprisonment, to the best knowledge and belief of [fol. 144] Petitioner, is a purported judgment and sentence of conviction issued out of and by the Superior Court for Spokane County, Washington, on the 14th day of December, 1935, in Cause No. 11114, wherein, Petitioner was adjudged guilty of the purported crime of Murder in the First Degree and Sentenced therefor, following trial by a jury, to be confined in the Washington State Penitentiary for the term of his Natural Life. By reasons of Petitioner being denied the rights, privileges and immunities, equal protection, and due process of law granted and guaranteed to him by the invocation of the Constitution of the State of Washington (Article 1, Section 22, Supplemented by 10th Amendment to said Constitution), and the State laws made in pursuant thereto, and the Constitution of the United States of America with its mandatory provisions of the Fourteenth Amendment to the United States Constitution, and his confinement by virtue of the aforesaid is illegal and without authority of law, judgment and sentence; he very respectfully Petitions the Court for a Writ of Habeas Corpus, it being the only remedy under existing law to correct the wrongs done him and affords redress at this instant if granted by discharging him in these premises.

V

Your Petitioner challenges the aforesaid purported judgment and sentence before the "Highest Court of the State of Washington"—under and by virtue of Washington's Laws of 1947, Chapter 256, Sections 1, 2, and 3; Article 1, Section 22, Supplemented by 10th Amendment to the Constitution of the State of Washington; and the invocation of the Fourteenth Amendment to the Constitution of the United States of America, with contentions that they are illegal and void, and the illegality thereof consists in this, viz:

1. Petitioner being deprived of ample time to prepare his defense to the crime charged in the Information in a Capital case.

2. Petitioner being placed on trial with Court appointed counsel who were assigned to the case on the 17th day of October, 1935, the date of Petitioner's arraignment on the said charge of first degree murder, and not accorded sufficient time to prepare an adequate defense before proceeding to trial on the 4th day of November, 1935, in spite of the vigorous and duly made protests of Petitioner and Counsel for an extension of time to prepare the case for the defense.

[fol. 145] 3. Petitioner being charged, maliciously, in words of the Information with having a number of aliases, and their mention being made twice for the sole purpose of impugnating the mind of the jury as to Petitioner's position without any direct proof being offered in support of the State's contention, except the connivance in listing the long string of aliases for the purpose of denoting character of defendant—Your Petitioner.

4. No testimony being offered by the State to support the theory that Petitioner did have in his possession, or held in his hand, any kind of a pistol or firearm that may have discharged upon and into the body of the said Harry J. Phillips, victim of the alleged murder.

5. Petitioner not being represented by counsel or legal representation of any kind to protect his position, as only competent counsel can in such cases, when the jury returned its verdict and said verdict being contrary to evidence as aforesaid.

6. Petitioner being deprived of Counsel's aid upon the very rendering of judgment and sentence by the Court which should have been quashed because of the aforesaid reasons and grounds, and as follows:

a. Newly discovered evidence, material for the defendant which he could not have discovered with reasonable diligence and produced at the trial.
b. Accident and surprise.
c. Error of law occurring at trial and excepted to by defendant.
d. Misconduct of the jury.

e. That the jury received evidence, papers and documents not allowed by the Court.

f. That the verdict is contrary to the law and the evidence.

g. The facts as stated in the Information do not constitute a crime.

h. The evidence which was introduced in the case was entirely contrary to the issues involved and were excepted to by defendant. (This was raised on motion to arrest judgment)

i. The Information is duplicious.

j. There was material variance between the allegations of the Information and the proof adduced at the trial as to amount to an entire failure of proof at the trial.

k. There was no evidence nor any attempt to present evidence of robbery or attempt robbery, or of premeditation as the Information charged.

l. The Instructions to the jury were so incoherent and misleading, that it was impossible for them as laymen to understand their duties to the defendant and the verdict.

[fol. 146] m. Had sufficient time been allowed competent counsel to complete an investigation before trial, counsel could have completely exonerated this Petitioner of the charge on which he was tried.

n. Insufficient time was allowed to locate defense witnesses.

7. That Petitioner upon being sentenced to the State penitentiary to a term of Natural Life on the 14th day of December, 1935, immediately filed oral notice of appeal to the State Supreme Court of Washington but before having an opportunty to obtain counsel to aid in prosecuting an appeal from the aforesaid judgment and sentence, was transported on the 16th day of December, 1935, from the Spokane County jail to the State penitentiary at Walla Walla, Washington.

8. Although confined in the above stated penitentiary, Petitioner made repeated efforts through legal channels, in Forma Pauperis, to obtain the transcript of said trial, Cause No. 11114, for the purpose of perfecting an appeal to the Supreme Court of the State of Washington, but said

efforts failing on denial of motions on the 20th day of January, 1936, by the Hon. Fred H. Witt, trial judge.

9. Immediately upon denial of the transcript of the said trial by the lower court as stated above, Petitioner sought a Writ of Mandate in the Supreme Court of the State of Washington, Eskridge v. Witt, re: Cause No. 26088, in further efforts to obtain transcript of trial, but this action also failed.

10. Petitioner had Washington State Supreme Court Cause No. 26179 on file with the Clerk of that Court, under which to file the transcript and perfect the appeal had trial court transcript been furnished him.

11. Petitioner's appeal was dismissed because he could not timely file a transcript in Cause No. 26179.

12. Petitioner being deprived of the right to appeal a first degree murder conviction on account of being an indigent person, was a denial of the rights guaranteed him by the Constitution of the State of Washington which, under Article 1, Section 22, supplemented by the 10th Amendment to this Constitution, provides:

> "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense [fol. 147] in charged to have been committed and the right to appeal in all cases: Provided, the route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." (underscore by Petitioner)

and was a denial of the due process of law, and the equal protection of the laws as guaranteed to him by Article XIV, Section 1, of the Amendments to the Constitution of the United States of America, commonly referred to as the Fourteenth Amendment, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (underscore by Petitioner)

Petitioner has a number of Exhibits which will be submitted by Motion, requesting of Your Honor that they be admitted in evidence in support of Petitioner's allegations in this matter.

Wherefore, because Petitioner is deprived of his liberty by virtue of a proceeding which resulted in his conviction, judgment and sentence against him without being afforded the granted and guaranteed rights, immunities, privileges, equal protection and due processes of law provided by the Fourteenth Amendment to the Constitution of the United States, and with its invocation to the Washington State Constitution, Article 1, Section 22, supplemented by the Tenth Amendment to said Washington State Constitution, and laws made in pursuance thereto. Petitioner prays his Motion for leave to proceed in Forma Pauperis be granted him; that an Order to Show Cause be issued returnable before the above entitled Court, fixing time to do and receive what shall be ordered therein, and that as a result thereof, a Writ of Habeas Corpus be issued in these premises and Petitioner be discharged from said illegal confinement and restraint.

Tom Eskridge, Petitioner pro se.

[fol. 148] AFFIDAVIT

STATE OF WASHINGTON,
County of Walla Walla, ss:

Tom Eskridge, first being duly sworn according to Law, deposes and says: That he is the above named petitioner; that he has read and signed the foregoing Petition and knows the contents thereof, and the same are true as he verily believes.

Affiant further states: That he is a citizen of the United States of America and a Person without property or funds or means with which to obtain funds or property to pay the costs connected with the action he seeks but verily believes himself entitled to the relief sought upon the aforesaid reasons and grounds; that without the above entitled Court issuing an Order granting him leave to proceed in Forma Pauperis, he will be without redress for his grievances. Therefore, Petitioner prays an Order be issued in his behalf by the Chief Justice of the Washington State Supreme Court granting him leave to proceed in Forma Pauperis as prayed for.

Tom Eskridge, Petitioner pro se.

Subscribed and sworn to before me this 19 day of March, 1953.

Allan Mathes, Notary Public in and for the State of Washington, residing in Walla Walla County.

[fol. 149] EXHIBIT TO PETITION FOR WRIT OF HABEAS CORPUS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 11114

INFORMATION (R.R.S. 2392)

STATE OF WASHINGTON, Plaintiff,

vs.

TOM ESKRIDGE, alias Thos. Jacobs, alias T. Jacobson, alias J. H. Warren, alias John Lowery, alias George Gregory, Defendant

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant, Tom Eskridge, alias Thos. Jacobs, alias T. Jacobson, alias J. H. Warren, alias John Lowery, alias George Gregory, with the crime of Murder in the First Degree, committed as follows:

That the said defendant, Tom Eskridge, alias Thos. Jacobs, alias T. Jacobson, alias J. H. Warren, alias John Lowery, alias George Gregory, in the County of Spokane, State of Washington, on or about the 30th day of July, 1935, then and therebeing, did then and there wilfully, unlawfully and feloniously, without excuse or justification, and with a premeditated design to effect the death of one Harry J. Phillips, and while engaged in an attempt to commit the crime of robbery, make an assault upon the said Harry J. Phillips with a pistol loaded with powder and leaden bullets, which said pistol so loaded with powder and leaden bullets, as aforesaid, the said defendant, Tom Eskridge, alias Thos. Jacobs, alias T. Jacobson, alias J. H. Warren, alias John Lowery, alias George Gregory, then and there held in his hand and shot and discharged the same at, upon and into the body of the said Harry J. Phillips, and in the manner and by the means aforesaid inflicted upon the said Harry J. Phillips a mortal bullet wound, of which said

bullet wound the said Harry J. Phillips did then and there die.

Ralph E. Foley, Prosecuting Attorney in and for Spokane County, Washington. By Leslie M. Carroll, Deputy.

STATE OF WASHINGTON,
County of Spokane, ss:

Leslie M. Carroll, being first duly sworn, on oath deposes and says: That the above and foregoing information is true as he verily believes.

Leslie M. Carroll.

Subscribed and sworn to before me this 17th day of October, 1935.

Sadie L. Lucas, Deputy County Clerk.

Filed Oct. 17, 1935, Frank C. Nash, Clerk.

[fol. 150] EXHIBIT TO PETITION FOR WRIT OF HABEAS CORPUS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

Case No. 11114

THE STATE OF WASHINGTON, Plaintiff,

vs.

TOM ESKRIDGE, Defendant

JUDGMENT, SENTENCE AND COMMITMENT UPON VERDICT OF GUILTY

PENITENTIARY

On this 14th day of December, 1935, the above named defendant came into open Court for pronouncement of judgment and sentence, and being asked by the Court if he had any legal cause to show why judgment of this Court should not be pronounced in his case he makes his statement, the defendant being represented by his counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Murder in first degree, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant be punished by confinement at hard labor in the Washington State Penitentiary, for a term of his natural life, and shall pay the costs of this prosecution taxed at $416.05.

That said defendant shall stand committed to said institution until this sentence is complied with.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 14th day of December, 1935.

Fred H. Witt, Judge.

Filed Dec. 14, 1935, Frank C. Nash, Clerk.

[fol. 150a] EXHIBIT TO PETITION FOR WRIT OF HABEAS CORPUS

Case No. 11114

VERDICT OF GUILTY OF MURDER IN THE FIRST DEGREE

We, the jury in the case of

THE STATE OF WASHINGTON, Plaintiff

vs.

TOM ESKRIDGE, Defendant

Find the defendant Guilty, as charged in the information.

Spokane, Washington, Nov. 13, 1935.

C. H. Anderson, Foreman.

Filed 9:05 P.M. Nov. 13, 1935, Frank C. Nash, Clerk.

Recorded, Journal A 249, Page 79.

[fol. 151] EXHIBIT TO PETITION FOR WRIT OF HABEAS CORPUS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 11114

STATE OF WASHINGTON, Plaintiff,

vs.

TOM ESKRIDGE, alias Thos. Jacobs, alias T. Jacobson, alias J. H. Warren, alias John Lowery, alias George Gregory; Defendant

SPECIAL VERDICT

If the jury should find the defendant, Tom Eskridge, guilty of murder in the first degree as charged in the Information, the jury will answer the following question:

Question: Shall the death penalty be inflicted upon the defendant, Tom Eskridge?

Answer: No.

Dated this 13 day of November, 1935.

C. H. Anderson, Foreman.

Filed 9:05 P.M., Nov. 13, 1935, Frank C. Nash, Clerk. Journal A-259-80

[fol. 152] EXHIBIT TO PETITION FOR WRIT OF HABEAS CORPUS

June 1, 1936.

Mr. William B. Coffey,
State Parole Officer,
Washington State Penitentiary,
Walla Walla, Washington.

DEAR MR. COFFEY:

We are enclosing herewith Penitentiary Report covering Tom Eskridge, who was sentenced by Judge Fred H. Witt, on December 14, 1935, to Life Imprisonment in Washington Sate Penitentiary, at Walla Walla, Washington, on his

conviction, November 13, 1935, by jury, of the crime of First Degree Murder.

It is the firm belief of the Prosecuting Attorney's office and that of the Court who heard this case that the defendant, Tom Eskridge, never under any circumstances should be permitted to again associate himself with society. His personality is such that he is a dangerous man at any and all times. His whole makeup is surly and he is antagonistic toward all tenets of society.

We have received letters from his sisters expressing the hope that the parole board and the state of Washington will never see fit to release him. His mother resides at Ketchikan, Alaska and has been advised of this situation. We have been informed by the U.S. Marshal of Ketchikan that he has talked with her and he states that his mother has given up all hopes of seeing him again and that the residents of Ketchikan are taking care of her material needs. The Marshal further states:

> "that this man Eskridge appears to be bereft of all common decency and manhood"

He goes on further and states:

> "I only hope that you will se to it that he remains in the penitentiary for the remainder of his natural life."

We have also talked personally with the stepfather of the defendant, and he, too, expresses the hope that the parole board of the State of Washington will see fit never to grant him any parole. Because of the deliberateness and coldbloodedness of this murder we feel we would be derelict in our duty if we did not express our opinion with reference to him to your board.

Respectfully yours, Deputy Prosecuting Attorney.

LMG' W

[fol. 153] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 11114

STATE OF WASHINGTON, Plaintiff,

vs.

TOM ESKRIDGE, Defendant.

Sentenced on December 14, 1935, by Judge Fred H. Witt, on conviction by jury on November 13, 1935, on a charge of First Degree Murder, to Life Imprisonment in Washington State Penitentiary, at Walla Walla, Washington.

Minimum Sentence Recommended:

By Judge, Life.
By Prosecuting Attorney, Life.
Age: 30.
Residence: California.
Birthplace, Virginia.
Nationality: American.
Occupation: unknown.
Date of arrest: August 3, 1935.
Convicted or pleaded guilty: Convicted by jury.
Industrious or otherwise? Shiftless.
Associates: Poor.
Character: Weak.
Disposition: Surly.
Is he again capable of becoming a good citizen? No.

Circumstances of the Case:

The defendant was placed under arrest August 3, 1935 at Boise, Idaho on the charge of grand larceny in connection with the theft of two typewriters from the Spangle schoolhouse. He pleaded guilty to the charge of grand larceny, was sentenced on August 10, 1935, and after receiving sentence was implicated in the charge of murder in the first degree for the slaying of Harry P. Phillips, a Spokane druggist, and was returned to Spokane County for trial and was convicted. Tom Eskridge was discharged from San Quentin Penitentiary, California, June 19, 1935. He

was to proceed to Ketchikan, Alaska, the home of his mother, but reached Everett, Washington on or about July 20, 1935, where he burglarized a garage, stole therefrom a 77 Willys automobile which was later used in the commission of Spokane County murder. He also stole therefrom extra license plates and an old Fox typewriter. He then, in company with a woman whose identity is at present unknown, proceeded to Spokane County, arriving here the next day. He stopped at an apartment house and quartered his car in a garage about a block away from the place where he lived. On the morning of July 31st he proceeded to the Manito Pharmacy, located in the City of Spokane, where he parked his car across the street from the store and after waiting a period of approximately an hour he entered the drug store with intent to commit a robbery, and in the scuffle that followed Eskridge shot and killed the druggist. After the shot was fired the druggist clung to the shoulders of the defendant, dropped on the curb and died. After the fatal shooting of Mr. Phillips the defendant returned to the apartment house, picked up the lady who stayed with him there, went out and stole another automobile in Spokane County, fled the city, and it was during this flight that he stole the typewriters which resulted in the grand larceny conviction.

[fol. 154] Prior Record:

August, 1935, The defendant, on his plea of guilty, was convicted of robbery with the use of firearms, Spokane County;

In the State of Utah, and on March 7, 1931, defendant was sentenced to the Utah Penitentiary. This sentence was suspended.

On August 29, 1931, defendant was convicted in Ventura, Calif., of the crime of burglary in second degree, and his term was fixed at 7 yrs. and 5 yrs., such sentences to run concurrently. He served in this penitentiary until the 19th day of June, 1935. As stated above, he was then convicted of grand larceny in Spokane County on August 10, 1935.

Leslie M. Carroll, Deputy Prosecuting Attorney:

Approved: Fred H. Witt, Judge.

This three-page document is an exact copy of the letter of transmittal and Prosecuting Attorney's report in the

case of the State of Washington v. Tom Eskridge, Spokane County Superior Court Cause No. 11114, as the same appears from the records of the office of the Prosecuting Attorney of Spokane County.

Hugh H. Evans, Prosecuting Attorney. By John J. Lally, Deputy Prosecuting Attorney.

[fol. 155] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 32466

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary, at Walla Walla, Washington, Respondent.

STATE OF WASHINGTON,
County of Thurston, ss:

I, Robert Holstein, Clerk of the Supreme Court of the State of Washington do hereby certify that the attached and foregoing is a full, true and correct copy of the Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Habeas Corpus and the whole thereof, as the same was filed in the above entitled case on the 23rd day of March, 1953, and now appears of record and on file in my office. I further certify that the Information, Judgment and Sentence and Commitment upon Verdict of Guilty, Special Verdict, and Prosecutor's Report are a part of the Return and Answer filed in my office in cause No. 32466 on May 7, 1953, and as called for by Item (13) A, B, C and D of the Stipulation which is a part of the Praecipe.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 28th day of October, 1957.

Robert Holstein, Clerk of the Supreme Court, State of Washington. (Seal.)

[fol. 156] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33928

In the Matter of the Application for a Writ of Habeas Corpus of

TOM ESKRIDGE, Petitioner,

vs.

MERLE E. SCHNECKLOTH, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, respondent

CLERK'S CERTIFICATE

STATE OF WASHINGTON,
County of Thurston, ss:

I, Robert Holstein, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a full, true and correct transcript of so much of the records and files in the above entitled cause as I am directed by Praecipe and attached Stipulation, and by Mr. Robert W. Graham, counsel for petitioner, to transmit to the Supreme Court of the United States as a record on Certiorari.

I further certify that certified portions of our files in cause No. 26088—*State* vs. *Eskridge;* cause No. 26179—*State* vs. *Cranor* are made a part of this record.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court this 16th day of December, 1957.

Robert Holstein, Clerk of the Supreme Court of the State of Washington. (Seal.)

[fol. 157] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 383 Misc.

TOM ESKRIDGE, Petitioner

vs.

MERLE E. SCHNECKLOTH, Superintendent of the Washington State Penitentiary.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —April 1, 1957.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 873 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

OCTOBER TERM, 1957

No. 96

TOM ESKRIDGE, *Petitioner,*

vs.

WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1956
CERTIORARI GRANTED APRIL 1, 1957

BRIEF OF PETITIONER

ROBERT W. GRAHAM
Attorney for Petitioner.
GEORGE N. PRINCE, *of Counsel.*

Office and Post Office Address:
603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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Supreme Court of the United States

OCTOBER TERM, 1957

TOM ESKRIDGE,	*Petitioner,*	No. 96
vs.		
WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES,	*Respondent.*	

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1956
CERTIORARI GRANTED APRIL 1, 1957

BRIEF OF PETITIONER

A. OPINION BELOW

There is no reported opinion of the Supreme Court of the State of Washington in support of its order (R. 32) denying petitioner's application for a writ of habeas corpus.

B. JURISDICTION

Jurisdiction of this Court is invoked under 62 Stat. 929, 28 U.S.C. §1257 in that it is contended that the validity of a state statute is drawn in question on the ground of its being repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States and rights and privileges of petitioner are specially set up or claimed under the provisions of the Fourteenth Amendment to the Constitution of the United States.

Petitioner's application for a writ of habeas corpus was denied by order of the court below on September

21, 1956 (R. 32), and upon motion for rehearing *en banc* filed October 8, 1956 (R. 34-35), the order denying petition for rehearing was entered October 24, 1956 (R. 35). Within ninety days thereafter as required by 62 Stat. 961 as amended, 28 U.S.C. §2101(c), petitioner's motion for leave to proceed *in forma pauperis* and petition for writ of certiorari were filed in this Court on November 7, 1956, and certiorari was granted on April 1, 1957 (R. 97).

C. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States under which petitioner's rights and privileges are asserted provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Petitioner asserts the invalidity of §5, Chapter 126, Washington Laws of 1913, Rem. Rev. Stat. §42-5, providing as follows:

> "When shorthand notes have been taken in any cause as in this act provided, if the court, or either party to the suit or action, or his attorney, requests a transcript of the notes into long hand, the official reporter shall make, or cause to be made, with reasonable diligence, full and accurate typewritten

transcript of the testimony and other proceedings, which shall, when certified to, as hereinafter provided, be filed with the clerk of the court where such trial is had for the use of the court or parties to the action. The fees of the reporter for making such transcript shall be fifteen cents per folio of one hundred words for the original copy, and five cents per folio for each carbon copy ordered before the original is made, or made at the same time as the original, and when such transcript is ordered by any party to any such suit or action said fees shall be paid forthwith by the party ordering the same, and in all cases where a transcript is made as provided for under the provisions of this act the cost thereof shall be taxable as costs in the case, and shall be so taxed as other costs in the case are taxed: *Provided,* That when the defendant in any criminal cause shall present to the judge presiding satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript, the presiding judge, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, in which case the official reporter shall be paid for preparing said transcript ten cents per folio for the original copy and five cents per folio for each carbon copy ordered at the same time as the original or made at the same time as the original, which transcript fee shall be paid in like manner as the per diem fees are paid as specified in section three of this act."[1]

[1] Amended by §5, Ch. 69, Washington Laws of 1943, R.C.W. 2.32.240, the proviso now reading as follows:

"Provided, That when the defendant in any criminal case shall present to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript fee therefor shall be paid out of the county treasury as other expenses of the court are paid."

3. Consideration of this case also involves the following constitutional provisions, statutes and rules of the Supreme Court of the State of Washington, the texts of which are set forth in Appendix A:

(a) Constitution of the State of Washington, Art. I, §22, as amended by Amendment 10.

(b) Statutes

Wash. Laws 1893, Ch. 61, §4, as amended by Wash. Laws 1901, Ch. 31, §2; Rem. Rev. Stat. §1729.

Wash. Laws 1913, Ch. 116, §§1, 2, as amended by Wash. Laws 1915, Ch. 104; Rem. Rev. Stat. §§1730-1, 1730-2.

Wash. Laws 1893, Ch. 60, §§7, 8, 9, 11; Rem. Rev. Stat. §§387, 388, 389, 391.

Wash. Laws 1913, Ch. 126, §5; Rem. Rev. Stat. §42-5.

(c) Court Rules

Rules of the Supreme Court (effective April 1, 1931):

Rule III, 1 Rem. Rev. Stat. p. 138, 159 Wash. xxxiii.

Rule VI, 1 Rem. Rev. Stat. p. 139, 159 Wash. xxxv.

Rule VIII, 1 Rem. Rev. Stat. p. 146, 159 Wash. xliii.

Rule XVI, 1 Rem. Rev. Stat. p. 149, 159 Wash. xlviii.

Rules of Pleading, Procedure and Practice (effective April 1, 1931):

Rule VII, 2 Rem. Rev. Stat. §308-7, 159 Wash. lxi.

Rule X, 2 Rem. Rev. Stat. §308-10, 159 Wash. lxiv.

Rule XVII (effective March 1, 1935), 178 Wash. xxxvii.

Rules of the Supreme Court (effective August 1, 1938):

Rule XII, 193 Wash. 14a.

Rules on Appeal (effective January 2, 1951):

Rule 47, 34A Wn.(2d) 53; R.C.W. vol. 0.

D. QUESTIONS PRESENTED

Petitioner, a person without funds, was denied a statement of facts or transcript of trial proceedings which was necessary to the prosecution of his appeal to review errors in the trial proceedings claimed in good faith, the denial of petitioner's application being based upon Rem. Rev. Stat. §42-5, Ch. 126, §5, Wash. Laws of 1913, providing that the trial judge "if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter" at public expense.

The questions presented are whether petitioner, because of poverty, was denied appellate review by the State of Washington available to others in violation of the due process and equal protection clauses of the Fourteenth Amendment (a) in that he was denied a statement of facts or transcript of proceedings necessary to the prosecution of his appeal and (b) in that he was not furnished with counsel on appeal.

E. STATEMENT OF THE CASE[2]

1. On October 17, 1935, information was filed in the Superior Court of the State of Washington for Spokane County charging petitioner with the crime of murder

[2] Paragraphs of the Statement of the Case have been numbered to facilitate reference in subsequent portions of this brief.

in the first degree (R. 89, 15). Upon arraignment on that date, counsel was appointed by the trial court to defend petitioner (R. 39) who thereafter moved unsuccessfully "for an extension of time, or a continuance ... in order that the said attorneys might have sufficient time to prepare a proper and legal defense" (R. 39). Following a trial of nine days commencing November 4, 1935 (R. 60, 77, 18), the petitioner, on verdict of the jury (R. 36) was found guilty of murder in the first degree on November 13, 1935. A special verdict recommended against imposition of the death penalty (R. 37). Following the denial of petitioner's motion for a new trial and motion for an order in arrest of judgment on November 29, 1935 (R. 43-44), judgment and sentence were pronounced on December 14, 1935, committing petitioner to confinement at hard labor in the Washington State Penitentiary for the term of his natural life (R. 44-45) where he began serving his sentence on December 16, 1935 (R. 7, 84). Petitioner gave oral notice of appeal to the Supreme Court of Washington in open court at the time of imposition of sentence (R. 45).

2. Thereafter on December 30, 1935, petitioner, without benefit of counsel (R. 26) and by letter addressed to the trial judge, advised that he was without funds to finance the appeal of his case to the Supreme Court of the State of Washington and requested the trial court to "grant me a transcript of all the records in my case" (R. 46-47). Petitioner also filed an affidavit bearing the same date stating that he was without "money or funds with which to secure a transcript of the evidence in said case" and asserting that "I believe that I have just and

sufficient grounds for an appeal in said case, and desire to perfect such an appeal" (R. 49). The prosecuting attorney of Spokane County moved "for an order denying the application for transcript at the expense of Spokane County" (R. 47) asserting "that the ends of justice would not be served by the granting of an application for a transcript of the record at the expense of Spokane County; . . . that it is believed that Spokane County is not justified in incurring the expense of getting out a transcript in this case; that the matter of appeal is not a matter of right, but a pure matter of discretion" (R. 48).

3. Being without funds and without benefit of counsel (R. 50) and being unable to be present at the hearing upon his application (R. 52), petitioner supplemented his application with a motion that the county furnish him the "records and files" in the cause "without cost to said defendant" (R. 57) and supplemented his request with a further affidavit setting forth further "grounds for said appeal" (R. 54-57).

4. The prosecuting attorney again moved for an order denying petitioner's request (R. 58) and in affidavit stated (R. 58-59) "that justice would not be promoted by furnishing the defendant with a free statement of facts to be made by the official court reporter and paid for by the County Treasurer" and "that the matter of appeal is not a matter of right, but a pure matter of discretion of the court" (R. 59). The State did not contend that a stenographic transcript of the testimony was unnecessary to review the questions which petitioner had indicated he desired to review nor did

the State contend that the appeal was frivolous or that it was not taken in good faith.

5. On January 20, 1936, the trial judge "Ordered, That the application for transcript at the expense of Spokane County be, and is, hereby denied, for the reason that in the opinion of the Court, justice would not be promoted by furnishing the defendant with a free Statement of Facts to be made by the Official Reporter and paid for by the County Treasurer, in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein" (R. 62-63).

6. Thereafter, on February 14, 1936, petitioner filed on his own behalf in the Supreme Court of the State of Washington (Cause No. 26088) a "Motion for Writ of Mandate" (R. 64-65) and a "Petition for Writ of Mandate" (R. 68-70) together with supporting affidavits (R. 65-68, 70-71) reciting that he was without funds with which "to secure a transcript of the evidence and/or an abstract of the record of said cause" (R. 66) or to secure "the assistance of counsel to prosecute an appeal on said conviction" (R. 69), and that he was "thereby unable to perfect affiant's appeal from said verdict and judgment and affiant will thereby be deprived of his constitutional rights to a fair and impartial trial of said charge" (R. 66). Petitioner requested that the Supreme Court of the State of Washington issue its writ of mandate ordering the trial judge "to enter an order in said criminal cause . . . [that] Spokane County . . . furnish to Relator a transcript of the evidence and an abstract of the record of said cause.

And for such other and further relief as may be meet in the premises" (R. 70).

7. The Petition for Writ of Mandate was submitted to the Supreme Court of the State of Washington upon relator's petition (R. 72) and the transcript of record furnished by the trial court (R. 64) by direction of the prosecuting attorney (R. 63-64). The motion docket entry denying the Petition for Writ of Mandate was entered April 24, 1936 (R. 72, 74) and judgment was entered May 27, 1936, denying the writ (R. 72).

8. Meanwhile, on April 15, 1936 (R. 75) the Prosecuting Attorney for Spokane County moved in the Supreme Court of the State of Washington for an order dismissing petitioner's appeal to that court (Cause No. 26179) "for the reason that the appeal heretofore taken from the conviction, judgment and sentence of the trial court in said cause has not been perfected by filing in the above court a certified statement of facts, certified transcript of record, abstract of record and appellant's opening brief within the statutory time, as provided by the court in Rule 17 of Rules of Court" (R. 76). The motion to dismiss and petitioner's Petition for Writ of Mandate "followed each other on the motion calendar" on April 24, 1936 (R. 78) and upon a docket entry granting the motion to dismiss (R. 79), judgment dismissing petitioner's appeal was entered May 27, 1936 (R. 79).

9. On July 25, 1956, petitioner filed a Motion for Leave to Proceed *in Forma Pauperis* (R. 5) and a Petition for a Writ of Habeas Corpus (R. 6-14) in the Supreme Court of the State of Washington. The request to proceed *in forma pauperis* was granted on July 25,

1956 (R. 6), respondent filed answer denying the allegations of the petition (R. 15) and thereafter the Petition for Writ of Habeas Corpus was denied on September 21, 1956 (R. 32) without opinion. A Motion for Rehearing *En Banc* (R. 34) was thereafter denied on October 24, 1956 (R. 35). This Court granted petitioner's Motion for Leave to Proceed *in Forma Pauperis* and his Petition for Writ of Certiorari on April 1, 1957 (R. 97), 353 U.S. 922, 1 L.ed.(2d) 719.

10. Petitioner stated in support of his application to the trial court for a transcript of the evidence that "I believe I have just and sufficient grounds for an appeal in said case, and desire to perfect such an appeal" (R. 49). Both in his affidavit in support of this application for transcript (R. 54-57), and in his affidavit in support of his application for a writ of mandate in Cause No. 26088 (R. 65-68), petitioner delineated these grounds for appeal as including, among others "disregard of the evidence adduced at said trial and of the law as laid down by the Court in the instructions, by the jury . . . and that said verdict was rendered on such passion and prejudice and not upon the law and evidence in said case" (R. 55, 66); that the jury "disregarded the law as laid down in the following instructions, and portions thereof . . . " (R. 55, 66); "refusal of the presiding judge to grant defendant . . . sufficient time in which to prepare this affiant's defense" (R. 55, 66-67); "newly discovered evidence" (R. 56-57, 67); and "that certain of the evidence given by certain of the witnesses . . . was false and untrue, and known to be so . . . That upon a new trial affiant will be able to produce evidence to establish the fact that such perjury was committed . . .

respecting certain material facts and issues in said case" (R. 57, 67).

11. In the Motion for New Trial (R. 37-38), filed on petitioner's behalf by the counsel appointed by the court to represent him at the trial (R. 39), the grounds for new trial were asserted to be (R. 37-38):

> "1. Newly-discovered evidence, material for the defendant which he could not have discovered with reasonable diligence and produced at the trial.
>
> "2. Accident and surprise.
>
> "3. Error of law occurring at the trial and accepted [sic] to by the defendant.
>
> "4. Misconduct of the jury.
>
> "5. That the jury received evidence, papers and documents not allowed by the Court.
>
> "6. That the verdict is contrary to law and evidence."

And in Motion for an Order in Arrest of Judgment filed by appointed counsel the asserted grounds included "that evidence was introduced in the case which was entirely collateral to the issues involved and excepted to by the defendant," and "that there was a material variance between the allegations of the information and the proof adduced at the trial as to amount to an entire failure of proof at the trial" (R. 41).

12. The affidavit by petitioner's appointed counsel in support of a Motion for Extension of Time to File Affidavits in Support of Motion for New Trial states that "the time was so short that the attorneys for the defendant herein were not able to make as [sic] complete and satisfactory investigation of all the facts surrounding the alleged crime and, because of the shortness of

time, they were not able to properly prepare the defense upon the charge" (R. 39). Counsel further stated that "the attorneys for the defendant were compelled to go to trial without adequate and proper preparation due to the refusal of the court to grant sufficient time for the preparation of defendant's case" (R. 40) and that "newly-discovered evidence is material and a large portion of it has come to these attorneys subsequent to the submission of the cause to the jury" (R. 40). Counsel's affidavit concludes: "Subsequent to the rendering of the verdict this affiant and his associate have secured information that in their opinion if presented to the court, with proper time to complete the investigation would completely exonerate this defendant from the charge upon which he was tried" (R. 40).[3]

13. Petitioner's application for a writ of habeas corpus in the court below called attention to the decision of this Court in *Griffin v. Illinois*, 351 U.S. 12, 100 L.ed. 891 (1956) (R. 7, 17, 22), and asserted that he "was denied the right to appeal as afforded others under the Constitution of the State of Washington" (R. 7, 17, 23). Pointing out that he was "not trained in legal proceedings or in the language of the law" petitioner asserted the unconstitutionality of R.C.W. 2.32.240 (R. 9), contended that "the accused in criminal prosecutions shall have the right to counsel" (R. 9) and that the denial of his application for a transcript of the trial proceedings by the trial court resulted in the denial of appellate review because he was a "poor person" (R. 12). Petitioner thus claimed that he "was denied due

[3] A further elaboration of the grounds of appeal asserted by petitioner is set forth in a prior petition for a writ of habeas corpus (R. 83-84).

process of law and the equal protection of the laws" in violation of his rights under the Fourteenth Amendment to the Constitution of the United States (R. 9, 10, 14, 17, 22-23).[4]

F. SUMMARY OF ARGUMENT

Petitioner in good faith claimed errors in the trial proceedings that were not reviewable on appeal from his judgment of conviction upon a "clerk's record" (which the State even refused to furnish him). Such errors could be reviewed under Washington procedure only upon the filing of a complete "statement of facts" covering the trial proceedings. Although Washington, like Illinois in *Griffin v. Illinois,* 351 U.S. 12, 100 L.ed. 891 (1956), authorized a "statement of facts" (the filing of which was in Washington a jurisdictional prerequisite to petitioner's appeal) in narrative form as well as by verbatim transcript, petitioner was denied a "statement of facts" in any form, or a transcript of the trial proceedings from which one could have been prepared, upon his application for a transcript of the trial proceedings under Rem. Rev. Stat. §42-5, Ch. 126, §5, Wash. Laws of 1913, which authorized the trial judge to provide indigent defendants a stenographic transcript of the trial proceedings at public expense "if in his opinion the ends of justice will thereby be promoted."

A statement of facts was also essential to the preparation of an "abstract of record" and compliance with other requirements of Washington appellate procedure. Petitioner was not afforded any other means of pre-

[4] See also R. 82 and R. 84 with respect to petitioner's like contentions in a prior application for a writ of habeas corpus.

paring a "statement of facts" nor was he afforded the assistance of counsel with which to make an attempt and the trial judge as well as the State viewed a stenographic transcript of the trial proceedings as an indispensable prerequisite to an appeal by petitioner which they considered not to be a "right" of petitioner but "a pure matter of discretion" of the trial court.

Washington construed Rem. Rev. Stat. §42-5 to vest "almost absolute discretion" in the trial court to determine whether a transcript of proceedings should be furnished indigent defendants and therefore, because of poverty, petitioner's "right to appeal" guaranteed by Article I, §22, and Amendment 10 of the Constitution of the State of Washington was subjected to the "almost absolute discretion" in the trial court to determine whether a transcript of proceedings should be furnished indigent defendants. Thus, because of poverty, petitioner's "right to appeal" guaranteed by Article I, §22, and Amendment 10 of the Constitution of the State of Washington was subjected to the "almost absolute discretion" of the trial judge whose errors he sought to review, whereas the right to appeal of defendants who had money enough to buy transcripts was not.

Petitioner was not afforded benefit of counsel in his efforts to obtain appellate review of the errors in the trial proceedings which he claimed and the intricacies of Washington criminal appellate procedure were such that destitute defendants without benefit of counsel were not afforded as adequate appellate review as defendants who had money enough to buy transcripts or retain counsel.

Washington accordingly denied petitioner equal protection of the laws and due process in violation of the rights guaranteed him under the Fourteenth Amendment as recognized by this Court in *Griffin v. Illinois,* 351 U.S. 12, 100 L.ed. 891 (1956).

G. ARGUMENT

BECAUSE OF POVERTY PETITIONER WAS DENIED APPELLATE REVIEW BY THE STATE OF WASHINGTON IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Article I, §22, of the Constitution of the State of Washington, as amended by Amendment 10, provides that "in criminal prosecutions, the accused shall have . . . the right to appeal in all cases. . . ."[5]

Having established that right, the inquiry here presented is whether Washington's scheme of statutory provisions and court rules governing criminal appellate procedure as applied to the appeal of this petitioner in 1935 met the test of effective appellate review and the rule announced by this Court in *Griffin v. Illinois,* 351 U.S. 12, 19, 100 L.ed. 891, 899 (1956), "that destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

---

[5] The further declaration is contained:

"In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

I. PETITIONER WAS NOT FURNISHED A STATEMENT OF FACTS OR TRANSCRIPT OF TRIAL PROCEEDINGS

1. A Statement of Facts or Transcript of Proceedings Covering the Trial Was Necessary for Adequate and Effective Appellate Review of Petitioner's Judgment of Conviction

(a) Washington criminal appellate procedure in 1935

(i) *The "Clerk's Record"*

Washington in 1935, like Illinois as disclosed in *Griffin*, made provision for a "clerk's record" on appeal. Rem. Rev. Stat. §1729; Ch. 61, §4, Wash. Laws of 1893; as amended Ch. 31, §2, Wash. Laws of 1901; Rule X, Rules of Practice, 2 Rem. Rev. Stat. §308-10, 159 Wash. lxiv (See Appendix A). At least until 1938,[6] and possibly thereafter,[7] this "clerk's record" in all criminal appeals prosecuted *in forma pauperis* was required to be furnished the appellant at the expense of the county. Rem. Rev. Stat. §1729 and Rule X(2) Rules of Practice, 159 Wash. lxiv. Since that time, however, except in capital cases subsequent to 1950 where the death penalty has been imposed,[8] a "clerk's

[6] " . . . Rem. Rev. Stat. §1729, on which the request for a transcript of the records and files to be furnished by the clerk of the superior court at the county's expense, is apparently based, was, if not superseded by Rule of Supreme Court 12, [1938] specifically repealed in 1943; . . . " *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 110, 119, 190 P.(2d) 762, 766 (1948).

[7] Rem. Rev. Stat. §1729 was expressly repealed by Ch. 206, Laws of 1943. See, however, Rule VIII, Rules of the Supreme Court, 193 Wash. 7a (effective Aug. 1, 1938) and present Rule 44, Rules on Appeal, 34A Wn.(2d) 47 (effective January 2, 1951), R.C.W. Vol. 0, indicating that a "clerk's record" in criminal appeals prosecuted *in forma pauperis* is still required to be furnished at the expense of the county.

[8] Rule 47, Rules on Appeal, 34A Wn.(2d) 53, effective January 2, 1951 (Printed in Appendix A).

record" has not even been available to indigent defendants at the expense of the state according to the Supreme Court of the State of Washington.[9]

As in Illinois, review in Washington on a "clerk's record" is limited to those errors appearing from the face of that record and does not reach trial errors.[10]

Despite the statutory mandate that the clerk of the trial court send up to the Supreme Court "a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal" (Rem. Rev. Stat. §1729 and see Rule X, Rules of Practice, 159 Wash. lxiv), petitioner was not even afforded this opportunity for appellate review. Having requested that he be

[9] "[2] There is no authority on which this court may permit the filing of appeal *in forma pauperis*. Rem. Rev. Stat., §1729 [P.P.C. §5-37], which was cited by relator in *State ex rel. Bird v. Superior Court*, *supra*, as authority for preparation, certification, and filing of records in criminal appeals prosecuted *in forma pauperis*, at the expense of the county, was repealed by the Laws of 1943, chapter 206, p. 639, §1, Rem. Supp. 1943, §42-5.

"[3] The only assistance, at public expense, to which an indigent defendant is entitled in prosecuting an appeal, is that provided by Rem. Supp. 1943, §42-5. As stated in *State ex rel. Marr v. Superior Court*, *supra*, that statute involves more than the mere indigence of the defendant. It prescribes that, if the prescribing judge does not think justice will be promoted, he shall not order a free transcript of the evidence for the accused on appeal. It is possible, but it is not manifest, as was the situation in the case cited, that the discretion of the trial judge was abused." *State ex rel. Bird v. Superior Court*, 30 Wn. (2d) 785, 789, 194 P. (2d) 374, 376 (1948).

See note (7) above, however.

[10] The statute making provision for the preparation of abstracts of the "clerk's record" and the statement of facts expressly provided that "nothing in this act contained shall alter in any respect the present manner of settling and certifying statements of fact and bills of exceptions." Rem. Rev. Stat. §1730-2; Ch. 116, §2, Wash. Laws of 1913, as amended by §2, Ch. 104, Wash. Laws of 1915 (Printed in Appendix A). See also discussions below relating to Statement of Facts in point (ii) entitled "Procedure for Review of Trial Errors."

furnished "a transcript of all the records in my case" (R. 47, see also R. 49, 51, 52, 55) the record here discloses that not even a "clerk's record" was furnished to the appellate court upon petitioner's appeal (Cause No. 26179) from his judgment of conviction (R. 73, 78). In dismissing petitioner's appeal, the court apparently "used the transcript furnished in the mandate case No. 26088" (R. 73)—a record which consisted "of so much of the record and files" in the trial court as the clerk of that court had "been directed by the Prosecuting Attorney of Spokane County to transmit to the Supreme Court of the State of Washington" (R. 63). This "clerk's record," which was "used by the Supreme Court of Washington" in dismissing petitioner's appeal in Cause No. 26179 before that court, was not only prepared by the prosecution for an entirely different purpose—it did not even contain a copy of the information (R. 36-44) upon which petitioner was prosecuted[11] and which he contended was defective! (R. 41, 46).

This petitioner was not only denied an appellate review of trial errors because of his poverty, he was denied *any* appellate review.

(ii) ***Procedure for review of trial errors***

The procedure available to petitioner in December, 1935, to review "trial errors" or errors other than those appearing from the face of the "clerk's transcript," was substantially identical with the Illinois procedure revealed in *Griffin*. In order to obtain full appellate

[11] The copy of the information contained in this record (R. 88) was filed in the office of the Clerk of the Supreme Court of Washington on May 7, 1953, as a part of the Return and Answer filed in Cause No. 32466 (R. 95).

review after the giving of his oral notice of appeal (R. 45), it was necessary for petitioner to prepare, serve, file and have certified by the trial judge a "bill of exceptions or statement of facts." Rem. Rev. Stat. §§387-389, 391, Ch. 60, Wash. Laws of 1893, §§7, 8, 9, 11; Rule III, Rules of the Supreme Court (effective April 1, 1931), 1 Rem. Rev. Stat. p. 138, 159 Wash. xxxiii; Rule VII, Rules of Practice (effective April 1, 1931), 2 Rem. Rev. Stat. §308-7, 159 Wash. lxi. (All printed in Appendix A.)

Under the provisions of Rem. Rev. Stat. §391 it was provided:

> "The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein. . . ."

In addition the petitioner was required to have typed and served upon the opposing party "an abstract of so much of the record and statement of facts as he may deem necessary to the proper hearing of his assignments of error." Rem. Rev. Stat. §1730-1, Ch. 116, §1, Wash. Laws of 1913 as amended by Ch. 104, §1, Wash. Laws of 1915; Rule VI, Rules of the Supreme Court, 1 Rem. Rev. Stat. pp. 139-145, 159 Wash. xxxv. (Printed in Appendix A.)

The elaborate detail specified for the preparation of abstracts as well as the certification of statements of

facts or bills of exceptions is set forth in these statutory and rule provisions noted, the official text of which is set forth in Appendix A, and to which reference is herewith made in the interest of brevity.

In addition, Rule XVII, Rules of Practice, effective March 1, 1935, 178 Wash. xxxvii, provided:

> "2. No appeal in a criminal case shall be effectual for any purpose unless the appellant shall, within sixty days after giving notice of appeal as hereinbefore provided, have filed or caused to be filed with the clerk of the supreme court the following:
>
> "(a) A statement of facts or bill of exceptions served on the respondent and certified by the judge of the court below according to the procedure, so near as may be, in civil cases;
>
> "(b) A transcript of record certified by the clerk of the court below, pursuant to the procedure, so near as may be, in civil cases;
>
> "(c) Appellant's abstract of record where required by the rules of the supreme court; with proof of service thereof on the respondent;
>
> "(d) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on the respondent;
>
> "(d) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on the respondent.
>
> "Except as herein otherwise provided, the giving of the notice of appeal, the filing in the supreme court of a certified statement of facts, certified transcript of record, abstract of record and appellant's opening brief shall be jurisdictional.
>
> * * * * * * * * *

"If not so filed, the statement of facts or bill of exceptions shall not be considered; and no question shall be reviewable on the appeal except the legal sufficiency of the indictment or information."[12]

(b) Petitioner asserted trial errors which could not be reviewed on a "Clerk's Record"

The following grounds for appeal were asserted by petitioner[13] in connection with his application for a transcript at public expense (R. 46-47, 54-57), the substance of these grounds being:

(i) The information was duplicitous;

(ii) Petitioner was brought to trial too soon to prepare an adequate defense;

(iii) The verdict was contrary to the evidence and instructions;

(iv) After the trial, petitioner discovered evidence, not reasonably available before, showing that material facts in the case against petitioner were established by perjured testimony, and that petitioner was not at the scene of the crime when it was committed.

Petitioner could not have presented to the appellate court these contentions above set forth without a full transcript of record certified by the clerk of the trial

[12] Since 1933 Washington has made provision for an "agreed statement of facts" in which event the necessity of sending up a "clerk's record" is eliminated. Rule 34 (4), Rules on Appeal, 34-A Wn.(2d) 37, Vol. 0, R.C.W.

[13] Subsequently petitioner urged various additional grounds for appeal (R. 83-84). These will not be discussed herein, it being assumed for the sake of argument that petitioner was under a duty to come forward and state all reasons why a transcript and statement of facts were necessary to his appeal at the time he applied for the transcript and statement, and hence may not claim error in the denial of a transcript and statement of facts for purposes which he did not state at the time.

court, which included a complete bill of exceptions or "statement of facts," comprehending oral proceedings both before and after trial as well as nine days of trial proceedings, certified by the trial judge to contain "all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record." Rem. Rev. Stat. §391; Ch. LX, §11, Wash. Laws of 1893 (See Appendix A).

(i) ***Sufficiency of the information***

Under Washington law the accused may not on appeal attack an information as duplicitous unless he has previously raised this question in the court below. *State v. Swartz,* 108 Wash. 21, 182 Pac. 953 (1919); *State v. Pierson,* 101 Wash. 318, 172 Pac. 236 (1918), and cases cited. Hence under Washington decisions this petitioner's objection on appeal could not have been founded on the information itself, which might have been included in a "clerk's record,"[14] but had to rest upon a bill of exceptions or statement of facts establishing that this objection was unsuccessfully raised in the court below, as it appears to have been on motion before plea of not guilty (R. 60) as well as on motion in arrest of judgment (R. 41).

(ii) ***Denial of request for continuance***

It appears from the record that on or about October 26, 1935 (R. 60) the trial court denied a request for a continuance by the defense attorneys who had been appointed on October 17, 1935 (R. 39 and see R. 83). Appellate review of this ruling required not only the clerk's transcript of the papers used, but also a bill of

[14] As noted above, Note (11), not even this was furnished petitioner.

exceptions or statement of facts, certified by the trial judge, incorporating those papers, if any, by reference, and setting out all other matters on which the ruling may have been based. The mere physical presence in the transcript or "clerk's record" of affidavits submitted in connection with the motion is immaterial if they have not been made part of the bill of exceptions or statement of facts, and certified by the trial judge. *State v. Wilson*, 139 Wash. 191, 246 Pac. 289 (1926); *State v. Hooker*, 99 Wash. 661, 170 Pac. 374 (1918); *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873 (1909).

(iii) ***Sufficiency of the evidence to support the verdict***

The Supreme Court of Washington has long held that it will not consider whether the evidence is sufficient to support the verdict unless the transcript includes a statement of facts, which in turn includes *all* the evidence submitted at the trial and a proper certificate to that effect by the trial judge.[15] *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042 (1903); *State v. Webb*, 20 Wash. 500, 55 Pac. 935 (1899); *State v. Robinson*, 12 Wash. 491, 41 Pac. 884 (1895).

(iv) ***Newly discovered evidence of perjury, or of an alibi, and the right to a new trial***

On November 14, 1935, petitioner's attorneys moved for a new trial, basing the motion in part on the grounds of newly discovered evidence (R. 37-40). This motion was heard and denied on November 29, 1935 (R. 43-44). The denial of this motion could not be re-

[15] The record must further "affirmatively show that no other evidence was before the court." See *State v. Wilson*, 139 Wash. 191, 194, 246 Pac. 289, 290 (1926).

viewed on appeal without causing the statement of facts to include all proceedings on the motion. As set forth above, the mere physical presence in the clerk's transcript of one or more of the affidavits or papers used would have made no difference. *State v. Colombo*, 178 Wash. 298, 34 P.(2d) 897 (1934); *State v. Newell*, 148 Wash. 82, 268 Pac. 130 (1928); *State v. Armstrong*, 87 Wash. 275, 151 Pac. 775 (1915)

(c) Compliance with the requirements for filing abstracts and briefs necessitated a transcript of trial proceedings

As noted above, Rem. Rev. Stat. §1730-1, Ch. 104, §1, Wash. Laws of 1915, required that there be prepared, served and filed an abstract of the record *and* the statement of facts necessary for a consideration of the appeal. Reference to the detailed and elaborate provisions of Rule VI, Rules of the Supreme Court, 159 Wash. xxxv, the provisions of which are set forth in Appendix A in view of their length, readily demonstrates, we submit, the obvious necessity for a complete transcript of the proceedings to meet these requirements with respect to a trial nine days in length (R. 60, 77, 18).

Where the abstract in proper form has not been timely served and filed, the Supreme Court of Washington has consistently refused to consider the statements of facts, which as noted above was essential to this petitioner's appeal.[18] *State v. Hampson*, 9 Wn.(2d)

[18] The question may perhaps be posed whether petitioner would have had the ability to comply with the rule as to abstracts, even if a transcript and statement of facts had been duly supplied to him—at least without the assistance of counsel. The rule as to abstracts was abrogated in 1942, see 11 Wn.(2d) xvii and Rem. Rev. Stat. (1943 supp.) pp. 2-3, seemingly in recognition of the burden imposed upon even the general run of litigants and their counsel.

278, 114 P.(2d) 992 (1941); *Morsbach v. Thurston County*, 152 Wash. 562, 278 Pac. 686 (1929); *Ollar-Robinson Co. v. O'Neill*, 80 Wash. 1, 141 Pac. 194 (1914).

Rule VIII, Rules of the Supreme Court, 1 Rem. Rev. Stat. p. 146; 159 Wash. xliii (set forth in Appendix A), further required the filing of printed briefs in which "each error relied on shall be clearly pointed out and separately discussed" and which "shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the abstract for verification in all instances where an abstract is required. In other instances, the reference shall be to the original record." Without such brief, petitioner's appeal would have resulted in an affirmance being directed in accordance with the provisions of Rule 16, Rules of the Supreme Court, 1 Rem. Rev. Stat. p. 149; 159 Wash. xlviii (See Appendix A). See *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939).

Under the provisions of Rule 17, Rules of Practice, quoted above; the transcript, certified statement of facts or bill of exceptions, abstract of record and opening brief all had to be filed with the clerk of the Washington Supreme Court "within sixty days after giving notice of appeal," and furthermore, such filing was "jurisdictional." The disastrous consequences of failing to comply with these requirements suffered by appellants seeking to act as their own counsel are illustrated by *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939) and *State v. West*, 197 Wash. 595, 86 P.(2d) 192 (1939).

The time requirements of Rule XVII were strictly enforced by the Supreme Court of Washington.[17] *State v. Hampson,* 9 Wn.(2d) 278, 114 P.(2d) 992 (1941); *State v. Nelson,* 6 Wn.(2d) 190, 107 P.(2d) 1113 (1940); *State v. Marcy,* 189 Wash. 493, 65 P.(2d) 1271 (1937); *State v. Silvia,* 195 Wash. 16, 79 P.(2d) 639 (1938). No extensions of time for other requirements could be obtained without the filing of appellant's proposed statement of facts in the trial court within the sixty-day period and this proposed statement of facts thus filed had to be substantially complete. After the sixty-day deadline it could not be "supplemented" although it could be "amended." *State v. Sherwood,* 166 Wash. 160, 6 P.(2d) 595 (1932); *Johnson v. Washington Trust Co.,* 33 Wn.(2d) 84, 204 P.(2d) 505 (1949); see *Livermore v. Northwest Airlines, Inc.,* 6 Wn.(2d) 1, 20-21, 106 P.(2d) 578, 587 (1940).

Thus, petitioner's appeal depended not simply upon his filing a proposed statement of facts, on the order of at least six or seven hundred pages in length for a nine-day trial, but upon his doing this, regardless of all hazards, within sixty days after he gave notice of appeal on December 14, 1935 (R. 45). This record is clear that neither the petitioner nor anyone else considered this to be a possibility unless he were furnished a statement

[17] The state supreme court later tacitly acknowledged that these time limitations operated too harshly. In 1944 the time period was extended from sixty to ninety days. Rule 12, Rules of the Supreme Court, effective February 18, 1944, Rem. Rev. Stat. (1945 supp.) 11, 18 Wn.(2d) 14-a. Still later, Rule 12, Rules on Appeal, effective January 2, 1951, 34A Wn.(2d) 50-51, characterized the filing and service of the proposed statement of facts, theretofore said to be "jurisdictional," as "steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired" by the supreme court.

of facts prepared by the official court reporter at public expense. The trial judge considered, as the prosecuting attorney frankly stated, that the right of appeal for an indigent defendant was "not a matter of right, but a pure matter of discretion of the court" (R. 48, 59).

2. No Equivalent or Other Means Than a Statement of Facts or Complete Transcript of Proceedings Was Afforded or Available to Petitioner

In *Griffin*, Illinois had neither by statute nor court rule required the filing of a stenographic transcript of the trial proceedings as a part of the bill of exceptions or statement of facts covering the entire trial proceedings. Nor has Washington. Petitioner in *Griffin* alleged that the stenographic transcript of the trial proceedings was "needed to prosecute an appeal,"[18] and these allegations were not denied. Respondent here has, by a general denial (R. 15), traversed the petitioner's allegations that the denial of his application for a "transcript of the trial" under the authority of Rem. Rev. Stat. §42-5, Ch. 126, §5, Wash. Laws of 1913 (now R.C.W. 2.32.240) deprived him of Constitutional rights under the Fourteenth Amendment in that he was "denied appellate review on account of being a poor person" (R. 8, 9, 12, 14).

The record here demonstrates the need of this petitioner for a transcript of the trial proceedings as well as the "clerk's record" if he is to be afforded effective appellate review. As indicated above, the errors which petitioner has asserted require for their appellate review a bill of exceptions or statement of facts covering

[18] *Griffin v. Illinois*, 351 U.S. 12, 13, 16, 100 L.ed. 891, 896, 897 (1956).

the entire trial proceedings. Whether or not the obligations of the Fourteenth Amendment could be met by furnishing petitioner something less than a stenographer's transcript of the trial proceedings is a question which this case does not present. See *Griffin v. Illinois*, 351 U.S. 12, 20, 100 L.ed. 891, 899 (1956); and see *Johnson v. United States*, 352 U.S. 565, 566, 1 L.ed.(2d) 593, 594 (1957); *Farley v. United States*, 354 U.S. 521, 522-523, 1 L.ed.(2d) 1529, 1531 (1957). Petitioner's application to the trial court for a "transcript" was construed by the prosecution to be for a "free statement of facts" (R. 59) and the trial court denied petitioner's application for a "transcript on appeal" for the reason that in the court's opinion "justice would not be promoted by furnishing the defendant with a free Statement of Facts to be made by the Official Reporter and paid for by the county treasurer" (R. 62-63). In short, because of poverty, petitioner was denied a "statement of facts" which was an indispensable condition precedent and jurisdictional prerequisite to the perfection of his appeal.[19] Without a "statement of facts" which was denied him, petitioner's appeal failed (R. 79) and it matters little whether that "statement of facts" could be by way of stenographer's transcript or some other "equivalent" such as the "trial judge's notes or an agreed statement by trial counsel."[20] No other "equivalent" was made available to petitioner and no suggestion was made by the prosecutor or trial court that any thing short of a complete transcript of the trial pro-

[19] Rule XVII, Rules of Practice, 178 Wash. xxxvjii; see also Appendix A.

[20] See *Johnson v. United States*, 352 U.S. 565, 566, 1 L.ed.(2d) 593, 594 (1957).

ceedings would serve to afford petitioner appellate review of the errors he asserted. Indeed, both the prosecutor and the trial judge considered that the petitioner's right to a "statement of facts"—in short his right to an appeal—was a matter solely within the discretion of the trial court, the prosecutor stating in his affidavit in opposition to petitioner's application, as has been noted, "the matter of appeal is not a matter of right, but a pure matter of discretion of the court" (R. 59).

The Supreme Court of Washington has recently suggested by way of dictum that a "complete answer" to a request by an indigent petitioner in the State of Washington for a stenographic transcript of the trial proceedings lies in the fact that the "statement of facts may be in narrative form, and need not be in the form of a verbatim reproduction of all that transpired during the trial of the cause." *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 811, 314 P.(2d) 930, 934 (1957). That even the court recognized the overstatement implicit in its suggestion is evidenced by the fact that the court, with its eye upon R.C.W. 2 32.240, added, "If a complete record is required on appeal, a convicted defendant has only to show a reason therefor, whereupon the law authorizes the trial court to order it at public expense."[21]

Not only has Washington long recognized that a bill of exceptions or statements of facts may be in narrative form[22] rather than by question and answer, but such is

[21] *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 812, 314 P.(2d) 930, 934 (1957).

[22] *Livermore v. Northwest Airlines, Inc.*, 6 Wn.(2d) 1, 106 P.(2d) 578 (1940); *State ex rel. Larpenteur v. Superior Court*, 183 Wash. 252.

also true of the decisions of Illinois cited in *Griffin*.[23] Historically it would seem that a narrative statement was customarily employed in the preparation of bills of exceptions before the advent of modern court reporting systems.[24]

Neither under the procedure of Washington in 1935 nor that of Illinois in *Griffin*, was a stenographic transcript of the trial proceedings a legal prerequisite to an appellate review of trial errors. *Griffin* held, however, that its denial abridged the constitutional rights of indigent defendants. Counsel for Illinois did not even suggest that "a narrative transcript would necessarily or even generally be the equivalent of a verbatim transcript of all of the trial"[25] and we think that few experienced trial counsel would equate them.

In 1913[26] Washington created its official court re-

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[23] See cases collected in opinion of Mr. Justice Black, 351 U.S. 12 at 14, n. 4, 100 L.ed. 891 at 896, and in dissenting opinion of Mr. Justice Harlan, 351 U.S. at 30, 31, nn. 2, 3, 100 L.ed. at 905.

[24] "It has become the usual, because the more convenient, method to prepare a bill of exceptions by the use of a stenographic transcript of the evidence. Even so, the bill ought not to contain all of the evidence but only that which is relevant to the issues made upon the appeal and often it is expedient and satisfactory to summarize the evidence and transmute it into narrative form. Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked." *Miller v. United States*, 317 U.S. 192, 198, 87 L.ed. 179, 183 (1942).

[25] *Griffin v. Illinois*, 351 U.S. 12, 14, n. 4, 100 L.ed. 891, 896 (1956).

[26] Ch. 126, Wash. Laws of 1913, presently R.C.W. 2.32.

48 P.(2d) 205 (1935), and cases cited; see *Mattocks v. Great Northern R. Co.*, 94 Wash. 44, 49-50, 162 Pac. 19, 21 (1916).

porter system and the record here reflects that, but for petitioner's lack of funds, there could have been available to him a stenographic transcript of the trial proceedings (R. 59; 63).

Whether or not an appeal could be technically perfected without the filing of a stenographic transcript of the trial proceedings was without significance in *Griffin*, and we think properly so. Whether or not modern reporting systems have led trial judges as well as counsel into an undesirable reliance upon reporters' transcripts, it certainly is the fact that resort to such transcripts has come to be nigh onto universal in appellate practice involving trial errors in the State of Washington irrespective of whether or not the statement of facts is certified in narrative form or in the form of the stenographic transcript itself.[27]

As recently stated, "Law addresses itself to actualities."[28] And it may be observed that "it does not face actuality to suggest" to petitioner that a narrative statement of facts (if he had been timely advised — which he was not) could serve as a substitute for the stenographic transcript of the trial proceedings itself.[28a]

The burden was upon the petitioner[29] to make and

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[27] See *Livermore v. Northwest Airlines, Inc.*, 6 Wn.(2d) 1, 106 P.(2d) 578 (1940), and cases cited note 22 hereinabove.

[28] Mr. Justice Frankfurter, concurring in *Griffin v. Illinois*, 351 U.S. 12, 23, 100 L.ed. 891, 901 (1956).

[28a] See Professor Francis A. Allen, Address, "*Griffin v. Illinois*: Its Antecedents and Implications," before the Conference of Chief Justices, July, 1957, proceedings of the Conference of Chief Justices; see also The Council of State Governments: "The Effects of *Griffin v. Illinois* on the States' Administration of the Criminal Law" (May, 1957) and compare *Chessman v. Teets*, 354 U.S. 156, 1 L.ed.(2d) 1253 (1957).

[29] It may also be noted that "a party proposing a statement of facts may

propose the statement of facts and to get it certified as containing "all the material facts, matters and proceedings heretofore occurring in the cause." *Livermore v. Northwest Airlines, Inc.*, 6 Wn.(2d) 1, 106 P.(2d) 578 (1940); *Nissen v. Chas. H. Lilly Co.*, 117 Wash. 470, 201 Pac. 743 (1921); *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859 (1911); *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738 (1905). It was required that the statement of facts must be served and filed "in good faith and with an intent that such statement is a full and complete record of the matters and proceedings occurring at the trial." *Colasurdo v. Colasurdo*, 27 Wn.(2d) 860, 869, 181 P.(2d) 172, 176 (1947). While the statement might have omitted immaterial matters without narrowing the scope of the appeal, *Palin v. General Construction Co.*, 45 Wn.(2d) 721, 277 P.(2d) 703 (1954), nonetheless, the proposed statement of facts must "purport to give the testimony of the witnesses, either by question and answer or in the narrative form," and could not be "a statement of the conclusions of counsel as to the force and effect of the testimony considered as a whole." *Morgan v. Chittenden Land Co.*, 92 Wash. 364, 159 Pac. 129 (1916).

The trial of petitioner lasted nine days (R. 60, 77, 18) and was attended by an official court reporter (R. 59, 63) whose notes if transcribed would have produced not less than several hundred typewritten pages. Upon giving notice of appeal on December 14, 1935 (R. 45), petitioner under Rule XVII, Rules of Practice, was

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not, designedly or through inadvertence, cast upon his opponent the burden of furnishing any considerable portion of a statement through proposed amendments." See *State ex rel. Larpenteur v. Superior Court*, 183 Wash. 252, 256, 48 P.(2d) 205, 207 (1935).

confronted with the necessity of preparing, serving and filing within sixty days (*i.e.*, by February 12, 1936) a certified statement of facts covering the complete[30] proceedings in the cause as well as an abstract of record and opening brief.

The record here discloses that two days after giving his notice of appeal, petitioner was incarcerated in the Washington State Penitentiary (R. 7, 84) and was, as well, without the benefit of counsel or the means to secure one (R. 59, 49, 55).

The record herein does not show that petitioner was advised that he could prepare a statement of facts by "do it yourself" methods. On the contrary, that possibility was not contemplated by anyone—judge, prosecutor or petitioner—as an equivalent for effective appellate review by petitioner. For a week or two after he was sentenced, petitioner apparently endeavored to get funds to pay for the prosecution of his appeal (R. 46). This effort failing, on December 30, 1935, he applied to the trial court for an order directing that a complete transcript of the trial proceedings be made up and furnished to him at public expense (R. 46-47, 49). The trial court set this application down for hearing on January 20, 1936, at which time it was denied (R. 50, 62-63). The application was vigorously opposed by the prosecuting attorney (R. 47-48, 58-59) who even went so far as to procure the erstwhile defense attorneys to join in his position (R. 60-61).

[30] The degree of completeness of a "complete" statement of facts of necessity must rest in the last analysis within the discretion of the trial court. See *State ex rel. Simcoe Sheep Co. v. Superior Court*, 2 Wn.(2d) 594, 98 P.(2d) 977 (1940). See also *State ex rel. Davies v. Superior Court*, 3 Wn.(2d) 102, 99 P.(2d) 934 (1940).

None of the affidavits or correspondence connected with this application suggested any alternative method of making an adequate statement of facts available. There was no offer to stipulate material facts. There was no offer to make the reporter's notes or anyone else's notes available in any form. On the contrary, the position of the prosecuting attorney was, as twice stated in so many words, that if the petitioner could not pay for his stenographic transcript of the trial proceedings, then "the matter of appeal is not a matter of right, but a pure matter of discretion of the court" (R. 48, 59).

The proposal of a complete statement of facts and compliance with the criminal appellate procedure of Wasnington in 1935 was a laborious and exacting task for a litigant under any circumstances (see Appendix A). In the circumstances confronting an indigent prisoner without benefit of counsel they became an impossibility unless a complete statement of facts covering the trial proceedings was furnished to him.[31]

That petitioner could not "be afforded as adequate appellate review as defendants who have money enough to buy transcripts"[32] unless a statement of facts or

[31] The penalty for his non-compliance with those procedural requirements was the dismissal of his appeal — a fate that befell many who sought their way through the labyrinth without the aid of those learned in the law. Rule XVI, Rules of the Supreme Court, 159 Wash. xlviii; 1 Rem. Rev. Stat. p. 149.

"The rule which requires the appellant in a criminal case to file a certified statement of facts or bill of exceptions with the clerk of this court within sixty days after appeal is taken is a salutary one, enacted to insure that punishment for crime shall not be too long delayed, and thus, in some degree, fail of its purpose. Our reports are replete with cases where it has been rigidly enforced." *State v. West*, 197 Wash. 595, 599, 86 P.(2d) 192, 194 (1939).

See also *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939).

[32] *Griffin v. Illinois*, 351 U.S. 12, 19, 100 L.ed. 891, 899 (1956).

transcript of the trial proceedings was furnished to him is, we submit, self-evident. In 1951, the Supreme Court of Washington itself recognized this when it provided in Rule 47, Rules on Appeal, 34-A Wn.(2d) 53:

> "Proposed statements of facts in cases wherein the death penalty has been imposed shall, when the appeal is prosecuted *in forma pauperis*, be furnished to appellant at the expense of the county."

Whether or not such adequate appellate review can be afforded indigent defendants without the obligation of the state to provide them with effective counsel is perhaps a question which need not be here decided,[33] but it is clear we think on this record that there was no "equivalent" of a statement of facts or transcript of proceedings afforded to the petitioner and we believe that, without the benefit of counsel at least, there could be none.

3. As Applied, Rem. Rev. Stat. §42-5 Denied to Petitioner Equal Protection and Due Process

The crucial question reached by this petition is whether or not the requirement of *Griffin* that "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts" is satisfied by the proviso in Washington's Official Court Reporter Act relating to typewritten manuscripts which in 1935 stated:

> "*Provided*, That when the defendant in any criminal cause shall present to the judge presiding

[33] See Point II of this Brief, below.

[33] *Griffin v. Illinois*, 351 U.S. 12, 19, 100 L.ed. 891, 899 (1956).

> satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript, the presiding judge, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, in which case the . . . transcript fee shall be paid in like manner as the per diem fees are paid as specified in section three of this act."[35] [*I.e.*, by the county.]

Preliminarily it may be noted that this case does not reach two potential questions suggested in the concurring opinion in *Griffin*. First, although the trial of petitioner was a matter of twenty years' history at the time of this Court's decision in *Griffin*, there can be no contention that petitioner waived his constitutional rights recognized in the *Griffin* case. In both his Petition for Writ of Mandate (R. 69) and supporting affidavit (R. 66) before the Supreme Court of Washington in 1936 in Cause No. 26088, petitioner contended that the trial court's denial of his application for a "transcript of the evidence and an abstract of the record" in view of his lack of funds deprived him of "his constitutional rights." And even if this had not been so, in none of the four opinions in *Griffin* is there support for a contention that the constitutional rights and privileges of indigent defendants recognized by *Griffin*—incarcer-

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[35] Rem. Rev. Stat. §42-5, Ch. 126, §5, Wash. Laws of 1913; amended by Ch. 69, §5, Wash. Laws of 1943 and readopted as R.C.W. 2.32.240 which now reads:

"... *Provided*, That when the defendant in any criminal case shall present to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript therefor shall be paid out of the county treasury as other expenses of the court are paid."

ated or otherwise — should be made to turn upon whether or not they made claim of a denial of constitutional rights and privileges at the time they may have been refused a transcript of proceedings at public expense prior to *Griffin*.[35a]

Second, no question is presented as to the steps which the State of Washington may take to protect itself against the waste and abuse of frivolous appeals. Neither the prosecuting attorney (R. 48, 58-59) nor the trial judge (R. 62-63) contended or considered that petitioner's appeal was frivolous or that it was not taken in good faith. The prosecutor asserted that "in his opinion no grave or prejudicial errors occurred" and "it is believed that Spokane County is not justified in incurring the expense of getting out a transcript in this case; that the matter of appeal is not a matter of right, but a pure matter of discretion" (R. 48, and see R. 59). And the trial court concluded that "justice would not be promoted by furnishing the defendant with a free Statement of Facts . . . in that defendant has been accorded a fair and impartial trial, and in the court's opinion no grave or prejudicial errors occurred therein" (R. 62-63).

This record contains no contention and no implication that petitioner's appeal was not prosecuted in good faith or that the errors claimed by petitioner and outlined above in paragraphs 10, 11 and 12 of the State-

[35a] Compare *Walker v. Johnston*, 312 U.S. 275, 85 L.ed. 830 (1941), and *Johnson v. Zerbst*, 304 U.S. 458, 82 L.ed. 1461 (1938); and see *United States v. Sanders*, 142 F.Supp. 638, 646 (D. Md. 1956).

See also Hon. Stanley E. Qua, Address: "*Griffin v. Illinois*," before the Conference of Chief Justices, July 10, 1957, proceedings of the Conference of Chief Justices.

ment of the Case were frivolous—errors, which if substantiated on appeal, would require a reversal of petitioner's judgment of conviction. Indeed, any such contention of frivolity would itself seem frivolous in the face of the affidavit of petitioner's appointed trial counsel which concluded with the statement "Subsequent to the rendering of the verdict this affiant and his associate have secured information that in their opinion if presented to the court, with proper time to complete the investigation would completely exonerate this defendant from the charge upon which he was tried" (R. 40). There is accordingly presented on this appeal no question as to a finding by the trial court that petitioner's appeal was not taken in good faith comparable to that presented in *Johnson v. United States*, 352 U.S. 565, 1 L.ed.(2d) 593 (1957) and *Farley v. United States*, 354 U.S. 521, 1 L.ed.(2d) 1529 (1957).

Rem. Rev. Stat. §42-5 is construed by the Washington Supreme Court to confer the broadest discretion upon the trial judge. In *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 465, 1 P.(2d) 331, 334 (1931) it is said:

> "The language of the statute is very broad and vests in the trial judge almost absolute discretion."

In *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 785, 194 P.(2d) 374 (1948) the trial court had "expressed the conviction that Bird had been accorded a fair and impartial trial, in which no grave or prejudicial errors had occurred."[36] In refusing to mandamus the trial court to furnish relator with a free transcript of trial proceedings the court stated:

[36] 30 Wn.(2d) 785 at 787, 194 P.(2d) 374 at 375.

> ": . . . we are committed to the rule that the constitutional provision under which a person convicted of crime is given the right to appeal, does not include the right to require the county to defray the cost of a transcript on appeal in the case of an impecunious defendant. In *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 1 P.(2d) 331 (all of the authorities are reviewed therein), which has never been modified, we held that the statute (Rem. Comp. Stat., §42-5, now Rem. Supp. 1943, §42-5) which authorizes the trial judge, upon satisfactory proof of inability to pay, to order a transcript if, in his opinion, justice will thereby be promoted, vests the matter in the discretion of the trial judge. The only statutory authority pertaining to costs on appeal, so far as indigent defendants are concerned, will be found in Rem. Rev. Stat., §42-5, as amended by the Laws of 1943, chapter 69, p. 129, §4, which was interpreted by this court in *State ex rel. Marr v. Superior Court, supra* . . ."[37]

Concurring in an earlier opinion in connection with the same mandamus action, Judge Schwellenbach wrote:

> ". . . the legislature, in Rem. Supp. 1943, §42-5, placed the initial responsibility for determining whether or not a transcript shall be furnished an accused at the expense of a county, upon the judge of the county where the application is made, and that judge should feel perfectly free to exercise his discretion in determining whether or not 'justice will thereby be promoted'."[38]

See also *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 809, 314 P.(2d) 930, 932 (1957); *State v. Perkins*, 32 Wn.(2d) 810, 866, 204 P.(2d) 207, 239 (1949).

[37] 30 Wn.(2d) 785 at 788, 194 P.(2d) 374 at 376.

[38] *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 110, 120, 190 P.(2d) 762, 767 (1948).

Under this statute the issue to be resolved by the trial judge is *not* whether the appeal is prosecuted in good faith.[39] Rather is the trial judge authorized to order a free transcript "if in his opinion justice will thereby be promoted."

Under this statute the denial of a transcript at public expense involves a determination of no less than the merits of the attempted appeal. In short, the trial judge is forced to conclude that he committed error at the trial if he grants a free transcript since the function of the appellate court is to correct errors of the trial court and one could hardly be expected to conclude that justice would be promoted by an appeal unless errors of the trial court were to be corrected. The circle may be completed by suggesting that if the trial court is of the opinion that justice will be promoted by an appeal (ostensibly to correct errors of the trial court) then he should grant a new trial so that the circle might start all over again.

There is something inherently distasteful as well as illogical in a process which makes a man the judge of his own errors[40] and one does not need to be learned in

[39] Compare *Johnson v. United States*, 352 U.S. 565, 1 L.ed.(2d) 593 (1957); and *Farley v. United States*, 354 U.S. 521, 1 L.ed.(2d) 1529 (1957), where this Court had for review the question as to the proper assistance to be afforded an indigent defendant seeking to review the trial court's determination that his appeal was "not taken in good faith" within the meaning of 62 Stat. 954, 28 U.S.C. §1915, authorizing the prosecution of appeals *in forma pauperis*.

[40] In appellate proceedings at common law, the trial judge is an additional defendant in error or respondent in every case, whether so named or not. In the earliest such proceedings, the royal courts of England apparently summoned the trial judges to defend their judgments in person or by champion. 2 Pollock & Maitland, History of English Law Before the Time of Edward I (2d ed. 1911) 666-669.

the law to recognize that readily admitting to one's errors is not one of the more pronounced characteristics of humankind (See R. 8).

In words which might well have been written in support of this petition,[4] Judge Steinert, dissenting in *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 785, 792, 793, 194 P.(2d) 374, 378 (1948), pointed up the impossibility of reviewing this ruling of the trial court on its own merits as follows:

> "Now, whether the trial court in refusing defendant's request with respect to a transcript of the testimony and other proceedings abused its discretion, is a question which we as a reviewing court cannot possibly decide unless in some way there is brought to us the record upon which the trial court based its decision. . . ."
>
> * * *
>
> "It may well be that, as stated by Judge Rosellini, 'justice would not be promoted by furnishing petitioner Bird with a free statement of facts,' and

[4] See also the dissenting opinion of Chief Judge Tolman in *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 466, 1 P.(2d) 331, 334 (1931), where he wrote:

"... But when the trial court goes beyond that and says, as he said here, that the applicant has been accorded a fair and impartial trial, and that no grave or prejudicial errors have occurred therein, then he thereby usurps the functions of this court and himself assumes to pass as a court of review upon his own rulings, and thus denies the constitutional right to appeal."

Even now, trial judges in many jurisdictions are personally answerable to writs of mandamus and prohibition; and in the normal course of appellate proceedings a trial judge must answer in the sense that he must customarily certify to the proceedings which have occurred before him. This was what was commanded by the writ of error, which was addressed to the trial judge. Tidd's Practice, *1141-1143; Stephen on Pleading, *128-134. Most rules of common law appellate procedure presume that such procedure is intended primarily to correct the errors of the trial judge and only incidentally to do justice between the parties.

that 'Bird had been accorded a fair and impartial trial.' But those are the very questions which we will be required to decide upon, or in connection with, the appeal when the record is brought to us. Whether or not a convicted defendant has had a fair and impartial trial, is of the very essence of every criminal appeal; and whether or not justice would be promoted in a given instance, is likewise a question within the province of this court, as a reviewing tribunal, to determine in connection with the appeal.

"'. . . And of what value to anyone is a constitutional right of appeal if the questions to be determined on such appeal are dependent upon a record which, though capable of being supplied, cannot be produced or obtained by the defendant because he is destitute? It is apparent that in this case the appeal will be futile without the record upon which the appeal is founded.'"[42]

Also to be noted with interest is the dissenting opinion of Judge Frank in *United States v. Johnson,* 238 F.(2d) 565, 568, 569 (CA-2, 1956) where he wrote:

". . . But a trial judge, in all honesty, may believe the trial free of error. In the instant case the trial judge stated, 'The jury was adequately and prop-

[42] The conclusion of Judge Steinert that:

"I am of the opinion that in a *capital case*, where the defendant is an indigent person, unable to pay for the transcript of the testimony and other proceedings in the case, it is an abuse of discretion to refuse to have such transcript supplied to him at the expense of the county, for otherwise the constitutional right of appeal is worthless." 30 Wn. (2d) 785, 793, 194 P.(2d) 374, 378.

undoubtedly contributed to the formulation of the following provision in Rule 47, Rules on Appeal, 34-A Wn.(2d) 53 (effective January 2, 1951):

"Proposed statement of facts in cases wherein the death penalty has been imposed shall, when the appeal is prosecuted *in forma pauperis*, be furnished to appellant at the expense of the county."

erly instructed as to the law'; but experience teaches that not too infrequently a trial judge mistakenly entertains such a view of his instructions to the jury."

* * *

"But how can the existence of such a meritorious appeal be shown unless the defendant has access to a transcript of the events at the trial?"

The recent dictum of the Supreme Court of Washington in *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 812, 314 P.(2d) 930, 934 (1957) implying that existing Washington procedure "satisfies every requirement" of the *Griffin* case does not appear to be in accord with the thinking of the Superior Court judges of the state who have been confronted with the problems of applying *Griffin*. A Special Committee of the Superior Court Judges' Association of the State of Washington has concluded that "*Griffin v. Illinois* does make a substantial change in Washington law, however, with respect to non-capital cases *in forma pauperis* in which there is a bona fide claim of reversible error and a showing that such record is necessary for appellate review; in such cases, the trial judge no longer has discretion to refuse an adequate record. And this is true, even though the state may deny that there was error or that it was prejudicial."[43]

As indicated above this case does not reach the question as to what may be an effective equivalent to a ste-

[43] Report of Special Committee Appointed to Study *Griffin v. Illinois*, Superior Court Judges' Association of the State of Washington; see Appendix B wherein this report is set forth in full. Compare, The Council of State Governments: "The Effects of *Griffin v. Illinois* on the States' Administration of the Criminal Law" (May, 1957).

nographer's transcript of the trial proceedings for purposes of affording adequate and effective appellate review to indigent defendants in Washington. There was none for this petitioner. Nor does this case reach the question as to the proper procedure which may be employed by the courts in Washington to determine what if anything less than a total transcript of proceedings may be sufficient to insure adequate review. The Report of the Special Committee of the Superior Court Judges' Association of the State of Washington, above referred to, suggests possible solutions and considerations with respect to applying the rule of *Griffin* to present Washington criminal appellate procedures. Whatever may be appropriate answers to such questions,[44] it is submitted that the *Griffin* rule requires a reversal of the judgment of the Washington Supreme Court below with the direction that a reporter's transcript or statement of facts covering the trial proceedings be furnished to petitioner and that he be permitted to perfect his appeal under existing rules and procedures upon the furnishing of such statement of facts.

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[44] Compare Illinois Supreme Court Rule 65-1, S.H.A. Ch. 110, §101.65-1 referred to in *People v. Griffin*, 9 Ill.(2d) 164, 137 N.E.(2d) 485, 486 (1956), and *In re Patterson's Petition*, ... Colo. ....., 317 P.(2d) 1041, 1042 (1957), with *State v. Moore*, ... N.D. ....., 82 N.W.(2d) 217 (1957). See also, The Council of State Governments: "The Effects of *Griffin v. Illinois* on the States' Administration of the Criminal Law" (May, 1957).

II. PETITIONER WAS NOT FURNISHED WITH COUNSEL ON APPEAL

1. The Failure of Washington to Furnish Petitioner with Counsel on Appeal Denied Him Equal Protection and Due Process

While it may well be that the Fourteenth Amendment does not impose the obligation upon the states to appoint counsel for indigent defendants in all criminal cases,[45] the implications of *Griffin* would certainly indicate that the appointment of counsel to aid indigent appellants on criminal appeals is indispensable to affording them "as adequate appellate review as defendants who have money enough to buy transcripts."[46]

[45] See *Betts v. Brady*, 316 U.S. 455, 86 L.ed. 1595 (1942), and compare *Powell v. Alabama*, 287 U.S. 45, 77 L.ed. 158 (1932).

[46] See *Schaefer* "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 10 (1956):

" . . . The analogy to the right to counsel is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, and so to obtain a different kind of trial, it must furnish the same opportunity to those who are unable to hire a lawyer. Since indigence is constitutionally an irrelevance, it would seem that a successful argument might be based upon the proposition that the defendant by reason of his poverty is deprived of a right available to those who can afford to exercise it."

And see Annotation, "Right of indigent defendant in criminal case to aid of state as regards new trial or appeal," 55 A.L.R.(2d) 1072, 1085:

" . . . But this comment may be made: the essence of the Supreme Court's ruling in the *Griffin* case is that a person convicted of crime cannot be put at a substantial disadvantage with respect to appellate review of his conviction merely because he is poor. Surely a substantial disadvantage exists where an appellant, because lacking the money with which to employ counsel, is forced to appear *pro se* before the appellate court. Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the *Griffin* doctrine."

See also The Council of State Governments: "The Effects of *Griffin v. Illinois* on the States' Administration of the Criminal Law" (May, 1957).

This was obviously the conclusion of Judge Frank, dissenting in *United States v. Johnson*, 238 F.(2d) 565, 570-571 (CA-2, 1956)[47] wherein he stated:

> "... In order, however, adequately to procure such a statement [of facts], and also adequately to point out in a petition to the upper court that (if it be a fact) the judge's certificate [that the appeal was not taken in good faith] was mistaken, the ordinary indigent defendant will need the assistance of counsel. Without such lawyer-assistance, such a defendant will be at a marked disadvantage as compared with a non-indigent defendant. Accordingly, I think the *Griffin* doctrine requires that an indigent defendant have such legal assistance; ..."

Certainly it "does not face actuality"[48] to review the labyrinth of criminal appellate procedure confronting this petitioner and conclude that he was not at a substantial disadvantage by virtue of the fact that he was not represented by counsel.

The Washington cases cited in argument above furnish eloquent testimony of the pitfalls encountered by others who have attempted to tread the appellate path unaided by those trained in the law.[49]

As set forth above in paragraph 13 of the Statement of the Case, petitioner here points out that he was "not trained in legal proceedings or in the language of the law" and he has contended that "the accused in crimi-

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[47] Reversed sub nomine *Johnson v. United States*, 352 U.S. 565, 1 L.ed. (2d) 593 (1957).

[48] Mr. Justice Frankfurter, concurring in *Griffin v. Illinois*, 351 U.S. 12, 23, 100 L.ed. 891, 901 (1956).

[49] See *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939); *State v. West*, 197 Wash. 595, 86 P.(2d) 192 (1939).

nal prosecutions shall have the right to counsel" (R. 9). Petitioner was represented by appointed counsel upon trial and "up to and including the argument for a new trial and motion to arrest judgment" (R. 26). For reasons neither material nor disclosed by the record, petitioner's appointed counsel thereafter withdrew from the case—apparently with the consent of the trial court.[50] In any event, from the time of giving his notice of appeal, petitioner was unrepresented by counsel, and certain it is that he was confronted with an "undertaking which was far beyond his capacity and understanding."[51]

The record does not reflect that petitioner made request of the trial court for the appointment of other counsel[52] to aid him in perfecting his appeal,[53] but even

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[50] See R. 77. The inconsistency of appointed counsel's affidavit in support of a motion for continuance of hearing the motion for new trial on behalf of petitioner (R. 39-40) with his affidavit in support of the state's motion resisting application for a transcript at county expense (R. 60-61), occasioned even the respondent in the court below to question "whether or not it was a violation of the attorney-client relationship and improper for the court to consider" this latter affidavit (R. 29).

[51] *State v. Currie*, 200 Wash. 699, 700, 94 P.(2d) 754, 755 (1939).

[52] Petitioner's affidavit in support of Motion for a Writ of Mandate indicates that he intended to prosecute his appeal on his own behalf (R. 67).

[53] See *Garrison v. Johnston*, 104 F.(2d) 128, 130 (CA-9, 1939), where it is observed,

"While it has been said that an accused 'requires the guiding hand of counsel at every step in the proceedings against him' (*Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 84 A.L.R. 527; *Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.ed. 1461), it is not clear as to when counsel appointed for trial is relieved of his duty to proceed further. It may be that counsel appointed to represent an accused for trial is relieved of any duty to proceed further upon judgment of the trial court; and that the accused, after conviction, should request either the trial court or the appellate court to appoint counsel for the appeal."

had he done so the decisions of the State of Washington indicate that such request would have been unavailing since there was no statute authorizing such an appointment.[54] It is submitted, however, that if adequate and effective appellate review entails benefit of counsel as well as benefit of a transcript of proceedings—as we think it must—the circumstances of this record required the courts below to provide the assistance of appellate counsel for this petitioner.[55]

Irrespective of whether or not this Court sees fit to equate the Sixth and Fourteenth Amendments in terms of an indigent defendant's constitutional right to the benefit of counsel on appeal,[56] the criminal appellate procedures of the State of Washington available to this petitioner in 1935 without the benefit of counsel as outlined above were such as to render his right to appeal completely illusory. Whether or not the failure, if not refusal, to furnish him the benefit of counsel on appeal without more, would have resulted in the denial of constitutional rights is a question which perhaps need not be here decided. It is submitted, however, that any re-

[54] See *State v. West*, 197 Wash. 595, 597, 86 P.(2d) 192, 193 (1939); see also *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 785, 789, 194 P.(2d) 374, 376 (1948), quoted above at note 9.

[55] Nor do we believe that it can be contended that any failure of petitioner to claim the right to counsel on appeal amounted to a conscious waiver of his constitutional rights. At a time when any such claim would have been unavailing under the law of Washington and at a time when this Court had not yet declared the extent of such constitutional right, it is believed that "candor compels acknowledgment" that petitioner "was justified in assuming that such a restriction upon criminal appeals in . . . [Washington] was presumably a valid exercise of the State's power at the time when he suffered its consequences." See Frankfurter, J., concurring in *Griffin v. Illinois*, 351 U.S. 12, 25, 100 L.ed. 891, 902 (1956).

[56] Compare *Johnson v. Zerbst*, 304 U.S. 458, 82 L.ed. 1461 (1938).

mand of this cause to the courts of the State of Washington for further proceedings must include an assurance to this petitioner of the benefit of counsel in those proceedings.

H. CONCLUSION

Petitioner requests in view of the foregoing that the judgment of the Supreme Court of the State of Washington denying his application for a writ of habeas corpus in Cause No. 33928 be vacated and that this cause be remanded to that court for further proceedings subject to the following conditions:

(1) that the judgment of the Supreme Court of the State of Washington in Cause No. 26179 dismissing petitioner's appeal from the judgment of conviction in Cause No. 11114 of the Superior Court of the State of Washington in and for Spokane County be vacated;

(2) that petitioner be furnished a statement of facts or stenographic transcript covering the trial proceedings in said Cause No. 11114;

(3) that petitioner, upon being furnished such statement or transcript, be permitted to perfect his appeal from the judgment in Cause No. 11114 of the Superior Court of the State of Washington in and for Spokane County in accordance with current rules and procedures of the Supreme Court of the State of Washington;

(4) that petitioner be furnished counsel without expense to him to assist him in the prosecution of his appeal; and

(5) such other conditions as may be necessary to insure to petitioner adequate and effective ap-

pellate review of the judgment of the trial court consistent with the obligations of the State of Washington to afford petitioner equal protection of the laws and due process under the provisions of the Constitution of the United States.

Respectfully submitted,

ROBERT W. GRAHAM
Attorney for Petitioner.
GEORGE N. PRINCE, *of Counsel.*

Office and Post Office Address:
603 Central Building,
Seattle 4, Washington.

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APPENDIX A

TEXT OF WASHINGTON STATUTES* AND COURT RULES CITED IN PART C OF BRIEF OF PETITIONER

CONSTITUTION OF THE STATE OF WASHINGTON

Art. I, §22, as Amended by Amendment 10

"RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be crim nal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed [Wash. Laws 1921, p. 79, §1. Approved November 1922]."

STATUTES*

Wash. Laws 1893, Ch. 61, §4, as amended by Wash. Laws 1901, Ch. 31, §2; Rem. Rev. Stat. §1729:

Within ninety days after an appeal shall have been taken by notice as provided in this title, the clerk of the Superior

*Text of statutes taken from the official session laws of Washington rather than from Remington's Revised Statutes.

Court shall prepare, certify and file in his office, at the expense of the appellant (except in criminal appeals prosecuted *in forma pauperis*, and in such cases at the expense of the county), a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within four months after said appeal shall have been taken by notice as aforesaid, the clerk of the Superior Court shall, at the expense of appellant, send up to the Supreme Court said transcript together with the original briefs on appeal filed in his office. The papers and copies so sent up together with any thereafter sent up as hereinbelow provided, shall constitute the record on appeal. Any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up as a part thereof, unless the Superior Court or a judge thereof has not yet passed on an application for the settlement and certifying of such bill or statement. In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal embracing so much th reof as the appellant deems material, or a copy thereof may be prepared, certified and sent up at any time prior to the hearing of the appeal. And in case the respondent deems any part of the files or record not already sent up to be material to the review of the matters embraced within the appeal, he may cause the clerk, in like manner, at his expense, to prepare, certify and send up a supplementary record on appeal embracing such omitted files or records, or copies thereof, at any time prior to the hearing of the appeal. Any such supplementary record or records, if filed in the Supreme Court prior to the hearing of the appeal, shall be considered by the court as part of the record on appeal, so far as the

same may be material to a review of the matters embraced within the appeal. When the review of an original paper in the cause may be important to a correct decision of the appeal, the court or judge may order the clerk to transmit the same to the clerk of the Supreme Court and the same shall be transmitted accordingly, and shall be under the control of the Supreme Court.

Wash. Laws 1913, Ch. 116, §§1, 2, as amended by Wash. Laws 1915 Ch. 104; Rem. Rev. Stat. §§1730-1, 1730-2:

SECTION 1. That that certain act entitled "An act relating to appeals to the supreme court of the State of Washington and amending section 1718 of Remington & Ballinger's Annotated Codes and Statutes of Washington," approved March 19, 1913, be amended to read as follows:

SECTION 1. That the appellant shall, at or before the time when he is required by rule or statute to serve his opening brief, cause to be typewritten and served upon the opposite party an abstract of so much of the record and statement of facts as he may deem necessary to the proper hearing of his assignments of error: *Provided*, That in all cases in which no testimony is sent up with the record, or in which the statement of facts does not exceed one hundred (100) pages of double space, typewritten evidence, no abstract of record shall be required. Said abstract, in so far as it sets out testimony, shall be condensed into narrative form, without the questions and answers except when necessary for the discussion of evidence. It shall be prepared without notice or hearing thereon, and if the opposite party be not satisfied with it, he may cause to be typewritten and served, without notice, either before or at the time of serving his answering brief, so much of the record and statement of facts, condensed as above, as he for his part may deem proper for the correction or supplementing of his opponent's abstract. Each party shall pay the cost of typewriting his abstract, and the prevailing party shall be entitled to recover

his disbursements therefor as other costs. For any abuse in typewriting excessive or unnecessary matter in the abstract, the supreme court, without regard to which party may prevail, may impose the costs thereof upon the party committing such abuse. The supreme court shall also provide by rule the form of abstracts, the number thereof to be typewritten, and for other particulars thereof, including the time and place of filing the same.

SEC. 2. Nothing in this act contained shall alter in any respect the present manner of settling and certifying statements of fact and bills of exceptions, and such statements and bills shall be transmitted to the supreme court to be referred to in any controversy concerning the accuracy of the abstracts, as well as for reference to exhibits, and for such other uses as the supreme court may find proper in consideration of all matters on appeal.

Wash. Laws 1893, Ch. 60, §§7, 8, 9, 11; Rem. Rev. Stat. §§387, 388, 389, 391:

SEC. 7. Alleged error in any order, ruling or decision to which it is provided in this act that no exception need be taken, or in any report, finding of fact, conclusion of law, charge, refusal to charge, or other ruling or decision which shall have been excepted to by any party as prescribed in this act, shall be reviewed by the supreme court, upon an appeal taken by the party against whom any such ruling or decision was made, or in which he has joined, from any other appealable order or from the final judgment in the cause, where such error, if found to exist, would materially affect the correctness of the judgment or order appealed from: *Provided*, The ruling or decision, the alleged error in which is sought to be so reviewed, together with the exception thereto, if any, was a matter of record in the cause in the first instance, or before the hearing of the appeal has been brought into the record in the manner prescribed in this act. And any such alleged error shall also be considered in

the court wherein or by a judge whereof the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion. But no exception to any appealable order or to any final judgment shall be necessary or proper in order to secure a review of such order or judgment upon direct appeal therefrom.

SEC. 8. Any party to any action or proceeding may, at any stage thereof, have any rulings or decisions of the court, or a judge, referee or commissioner thereof, in the cause, together with the necessary evidence, papers or proceedings connected therewith or on which the same were based, and the exceptions thereto, if any, not already a part of the record in the cause, or so much of all or any thereof as is not already a part of the record, made a part of the record in the cause, by the certifying of a bill of exceptions as in this act provided. And any such party may, after the making of an appealable order or the final judgment in the cause, have all rulings, decisions, evidence, papers, proceedings and exceptions in the cause, or so much thereof as may be material to an appeal from such appealable order or from the final judgment, as the case may be, not already a part of the record, made a part of the record in the cause by the certifying of a statement of facts, as in this act provided. The certifying of a bill of exceptions or statement of facts shall not prevent the subsequent certifying of other bills of exceptions or statements of facts, or both, comprising other matters in the cause, at the instance of the same or another party; but only one bill of exceptions or statement of facts can be settled or certified after the rendition of the final judgment in the cause.

SEC. 9. A party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service any other party may file and serve on the proposing party, any amendments which he may propose to the bill or statement. Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the bill or statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the bill or statement. If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to and shall be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and excepted, the bill or statements as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments.

SEC. 11. The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed, to be all that are material therein. The certificate shall be signed by the judge, but need not

be sealed; and thereupon all the matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein. The judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard. And if the judge refuses to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto.

Wash. Laws 1913, Ch. 126, §5; Rem. Rev. Stat. §42-5:

SEC. 5. When shorthand notes have been taken in any cause as in this act provided, if the court, or either party to the suit or action, or his attorney, requests a transcript of the notes into long hand, the official reporter shall make, or cause to be made, with reasonable diligence, full and accurate typewritten transcript of the testimony and other proceedings, which shall, when certified to, as hereinafter provided, be filed with the clerk of the court where such trial is had for the use of the court or parties to the action. The fees of the reporter for making such transcript shall be fifteen cents per folio of one hundred words for the original copy, and five cents per folio for each carbon copy ordered before the original is made, or made at the same time as the original, and when such transcript is ordered by any party to any such suit or action said fees shall be paid forthwith by the party ordering the same, and in all cases where a transcript is made as provided for under the provisions of this act the cost thereof shall be taxable as costs in the case, and shall be so taxed as other costs in the case are taxed: *Provided*, That when the defendant in any criminal cause shall present to the judge presiding satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript, the presiding judge, if in his opinion justice will

thereby be promoted, may order said transcript to be made by the official reporter, in which case the official reporter shall be paid for preparing said transcript ten cents per folio for the original copy and five cents per folio for each carbon copy ordered at the same time as the original or made at the same time as the original, which transcript fee shall be paid in like manner as the per diem fees are paid as specified in section three of this act.

COURT RULES

RULES OF THE SUPREME COURT (effective April 1, 1931):

Rule III, 1 Rem. Rev. Stat. p. 138, 159 Wash. xxxiii:

RULE III

TRANSCRIPT AND STATEMENT OF FACTS

1. Transcripts may be printed or typewritten. If typewritten, the paper shall be of good quality of the size of legal cap, and only a black record ribbon shall be use. If printed, there shall be a compliance with the rule with reference to printed briefs as to size, spacing and print. The transcript shall be free from interlineations and erasures, and shall be paged and prefixed with an alphabetical index of its contents, specifying the page of each separate paper, order or proceeding.

2. Every statement of facts shall comply in form with the rule with reference to transcripts. The index thereto shall specify the page on which the testimony of each witness commences, the page at which exhibits are introduced, the page on which motions made during the course of the trial are recorded, and the page of the ruling of the court thereon.

3. All exhibits shall be lettered or numbered in consecutive order, and, where practicable, shall be attached to the statement of facts. Each exhibit shall be identified by endorsing on the face thereof, in a conspicuous place, its letter or number, an abbreviated title of the cause, and the superior court number of the cause. Where, from the nature of the exhibit, it is not practicable to make such an indorsement, the exhibit may be identified by a tag, securely fastened thereto, on which is written or printed its letter or number, the title of the cause, and its superior court number.

4. In all cases where the judge of the superior court has filed a written memorandum giving his reasons for his decision, the same shall be included as a part of the statement of facts.

Rule VI, 1 Rem. Rev. Stat. p. 139, 159 Wash. xxxv:

RULE VI

ABSTRACTS

In every case in which the statement of facts contains over 100 pages, an original and two legible copies of a typewritten abstract of the record shall be filed with the clerk of this court, along with the briefs of the party preparing the same. The typewritten abstract shall be in the same form as the transcript in the cause, shall be indexed, and shall contain appropriate references by pages to the transcript or statement of facts. Printed abstracts, bound separately from the printed briefs, but of the same size, type and form as the printed briefs, will be given the same effect by the court as typewritten abstracts. The abstract shall be substantially in the following form:

(The form outline suggested covers only a trial by jury in a civil action. In causes tried by the court, in criminal causes, and all special proceedings, the same general outline should be followed. In all cases, follow the events of the trial in their chronological order. Do not omit the appropriate captions or headings. Use the abbreviations Tr. for transcript; St. for statement of facts; p. for page. Append to the abstract in all instances appropriate references to the transcript or statement of facts, showing the page on which the matter abstracted will be found. Do not in any instance abstract more of the proceeding than is necessary to show the error involved. The cardinal rule to be observed is, present everything necessary to an understanding of the questions raised on the appeal in a brief and concise manner, and omit everything else.)

(On the cover).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN DOE,

Appellant (Or Respondent),

v.

RICHARD ROE,

Respondent (Or Appellant).

APPELLANT'S ABSTRACT OF RECORD

Appeal from the judgment of the superior court of .....County. Hon.....Judge.

A. B. & C. D.

Attorneys for Appellant.

(Address)

E. F. & G. H.

Attorneys for Respondent.

(Address)

(On the second page)

INDEX

(Here insert a complete index to each separate matter contained in the abstract, showing the page of the abstract on which it is found.)

(On the third and succeeding pages)

Complaint

On the.....day of....., 19....., the plaintiff served upon the defendant a complaint stating his cause of action as follows:

(Set out all of the complaint necessary to show the nature of the action and to an understanding of the questions presented on the appeal, and no more. Omit all formal parts, unless error is based thereon. In setting out exhibits attached to the complaint, omit all formal or irrelevant parts. Usually a general description of the exhibit will be sufficient.)

Summons

The summons and the return thereon are as follows:

(Insert so much of summons and return as may be necessary to show the error based thereon. If no error is claimed with reference to either the summons or return, omit any reference thereto.)

Motions

On the.....day of....., 19....., the defendant appeared generally (or specially) in the action and moved to quash the service (or to make the complaint more definite and certain, etc.), basing his motion on the following grounds:

(Here state the grounds of the motion.)

Thereafter, and on the.....day of....., 19....., the same was submitted to the court and the following ruling was made thereon:

(Set out the ruling of the court, giving only the substance unless the entire entry is necessary to show the error claimed. If no error is predicated on the motion, omit all reference thereto.)

Demurrer

On the.....day of....., 19....., the defendant demurred to the complaint on the following grounds:

(Set out only the ground of demurrer on which the error is predicated.)

On the.....day of....., 19....., the same was submitted to the court and the following ruling made thereon:

(Set out the substance of the journal entry containing the ruling. Omit all formal parts unless necessary to show the error claimed. If no error is based on the ruling on the demurrer, omit any reference thereto.)

Answer

On the.....day of....., 19....., the defendant answered the complaint as follows:

(Set out so much of the answer as may be necessary to make clear the issues and present the questions raised on the appeal. If affirmative defenses are pleaded, set out only the substance of them, unless a literal copy is necessary to show the error claimed. If motions or demurrers were made to the answer, and error is predicated on the rulings made thereon, set out the same under the caption, "MOTION TO ANSWER," "DEMURRER TO ANSWER," as the case may be, following the form suggested for motions and demurrers directed against the complaint.)

Reply

On the.....day of....., 19....., the plaintiffs replied to the answer as follows:

(Here set out the substance of the reply. If motions or demurrers were directed against the reply, and error is based on the rulings thereon, set out the same under the caption, "MOTION TO REPLY," "DEMURRER TO REPLY," as the case may be, following the form suggested for motions and demurrers directed against the complaint.)

Trial—Examination of the Jury

On the.....day of....., 19....., the cause was tried by a jury wherein the following proceedings were had:

JOHN STYLES, being called and duly sworn to make true answers touching his qualifications to sit as a juror, answered the interrogatories propounded to him as follows:

(Set out his answers in narrative form, unless the questions propounded are necessary to an understanding of the objections made to his qualifications. If no question is made on the appeal as to the qualification of any juror, omit all reference to the method by which the jury was impaneled; state simply that a jury was impaneled and sworn.)

Statement of Counsel

After which, A. B., of the attorneys for the plaintiff, made the following statement to the jury:

(Set out the statement if necessary to an understanding of any question raised on the appeal. If not, omit all reference to the statement. Proceed in the same manner through all of the preliminary proceedings had prior to the commencement of the introduction of testimony, in so far as the same is necessary to an understanding of some question raised on the appeal.)

Evidence

TITUS OATES, called and sworn as a witness on behalf of the plaintiff, testified as follows:

(Set out his testimony in narrative, unless the question and answer is necessary to an understanding of the error claimed. If the witness identifies an exhibit, and the exhibit is introduced in evidence, insert a description of the same. Let the witness speak in the first person. Make appropriate references to the abstract or the statement as the case may be: e.g., Ab. 57; St. 140. One reference at least shall be made to each separate page abstracted.)

On CROSS-EXAMINATION, he further testified as follows:

(Set out his cross-examination, following the form suggested for his direct testimony.)

On RE-DIRECT EXAMINATION, he further testified as follows:

(Set out the same as above directed. Continue in the same manner with respect to each witness sworn on behalf of the plaintiff. In all cases abstract only so much of the evidence as may be necessary to show the error involved; it is necessary to abstract the evidence in full only in those cases where the entire evidence is required to show the error.)

Motion for a Nonsuit

The plaintiff having rested, the defendant moved for a nonsuit (or a directed verdict, challenged the legal sufficiency of the evidence, as the case may be), on the grounds that (state the grounds of the motion). The court overruled (or sustained) the motion, stating the reason for the ruling as follows:

(Set out the reasons given.)

Defendant's Evidence

WILLIAM DUDLEY, called and sworn as a witness on behalf of the defendant, testified as follows:

(Set out his testimony in the manner given for abstracting the evidence of the plaintiff's witnesses.)

Plaintiff's Rebuttal Evidence

The defendant having rested, the plaintiff introduced the following testimony in rebuttal:

(Abstract the evidence in the manner given for abstracting evidence of the plaintiff's witnesses in chief. If the defendant offers evidence in rebuttal of that offered by the plaintiff, set the same forth with the caption, "DEFENDANT'S REBUTTAL EVIDENCE.")

Requested Instructions

At the conclusion of the evidence, the plaintiff (or defendant, as the case may be) requested the court to give the jury the following instructions:

(Set forth the instructions requested and refused on which the claim of error is predicated. Show in the appropriate place the exceptions taken to the refusal to give each requested instruction.)

Instructions Given by the Court

The court instructed the jury orally (or in writing, as the case may be) as follows:

(Set out the substance of each instruction given, and the instructions in full to which exceptions are taken and on which error is predicated. Show in the appropriate place the exceptions taken to the instructions.)

Argument

The cause was argued to the jury by the attorneys for the plaintiff and defendant, during which A. B., of the attorneys for the plaintiff (or defendant, as the case may be), used the following language:

(Set out the argument to which objection is made.)

To the argument of the attorney the opposing attorney objected for the reason (set out the reason). The court ruled thereon as follows: (Set out the ruling.)

(If no error is predicated on the argument of counsel, omit any reference to it.)

Verdict

The jury retired to consider of their verdict, and thereafter, on the.....day of....., 19....., returned the same into court as follows:

(Set out the body of the verdict, omitting all formal parts.)

Motion for a New Trial

On the.....day of....., 19....., plaintiff moved for a new trial (in arrest of judgment, for a judgment *non*

obstante veredicto, as the case may be), basing his motion upon the following grounds: (Set out the substance of the motion.) The court granted (or denied) the same on the .....day of....., 19....., on the following grounds:

(If the motion is granted or denied and a claim of error is made thereon on the appeal, set out sufficient of the entry to show the claim of error.)

Judgment

Upon the return of the verdict, judgment thereon was entered as follows:

(Set out sufficient to show the nature of the judgment entered. If error is predicated thereon, set forth all that is necessary to show the error. Omit all formal parts.)

Appeal

On the.....day of....., 19....., the plaintiff (or defendant) appealed from the judgment by giving notice in open court (or by serving a written notice), and on the .....day of....., 19....., filed his bond on appeal, conditioned as a cost bond (or cost and supersedeas bond, as the case may be). The transcript on appeal was prepared and filed in the office of the clerk of the superior court on the .....day of....., 19.....; the statement of facts was filed on the.....day of....., 19.....; and served on the.....day of....., 19.....; amendments to the statement of facts were proposed by the respondent on the .....day of....., 19.....; and the statement was settled and certified by the trial judge on the.....day of .....day of....., 19.....

.....

Attorneys for Appellant.

Rule VIII, 1 Rem. Rev. Stat. p. 146, 159 Wash. xliii:

RULE VIII

CONTENTS AND STYLE OF BRIEFS

1. Briefs shall be printed throughout in plain, clear type, not smaller in size than eleven point, on unglazed white paper, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages

of the abstract for verification in all instances where an abstract is required. In other instances, the reference shall be to the original record.

2. Each error relied on shall be clearly pointed out and separately discussed under appropriate designated headings. Where there are several assignments presenting the same general questions, they may be discussed together. Where an objection is based on an instruction of the court, the instruction shall be set forth in the brief in full.

3. In citing authorities, the title of the case and the page of the volume on which it is reported must be clearly set out in each place in the brief where the case is mentioned; and in citing text books, the edition must be specified.

4. Briefs must be of the following dimensions: 8½ inches from top to bottom; 6½ inches from edge to edge, inclusive, of the margin, which must be 1½ inches at the top, bottom and outer edge of each printed page. The cover shall either be gray, or some other color that will readily show the print. The title of the case, the designation, Appeal from the Superior Court of.....County, ...Judge, Brief of Appellant (or Brief of Respondent, Appellant's Reply Brief, as the case may be), and the names of the attorneys appearing on the side upon which the brief is filed, with their respective addresses, shall be printed on the front cover.

5. Twenty-five copies of all printed briefs shall be filed with the clerk.

6. Any party, after filing briefs, may submit additional authorities, not less than one day prior to the hearing of the appeal. The authorities so submitted shall be typewritten or printed, and six copies thereof shall be filed with the clerk of this court, and not less than one copy served upon the adverse party.

Rule XVI, 1 Rem. Rev. Stat. p. 149, 159 Wash. xlviii:

RULE XVI

FAILURE TO FILE BRIEFS

If the appellant fails to file a brief, an affirmance will be directed. If the respondent files no brief, the cause will be deemed submitted upon its merits as to him. A respondent who has not filed a brief shall not be permitted to argue the cause orally without permission of the court.

RULES OF PLEADING, PROCEDURE AND PRACTICE (effective April 1, 1931):

Rule VII, 2 Rem. Rev. Stat. §308-7, 159 Wash. lxi:

RULE VII

TIME FOR FILING STATEMENT OF FACTS

1. A proposed bill of exceptions or statement of facts must be served and filed either before or within ninety days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed. And the certifying of a bill of exceptions or statement of facts provided for by Chapter VII of Remington's Compiled Statutes (Pierce's Code, §§7810-7826), and the filing and service of the proposed bill or statement, the notice of application for the settlement thereof, and all other steps and proceedings leading up to the making of the certificate, shall be deemed steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause; and no irregularity or failure to pursue the steps prescribed by this rule on the part of any party or the judge shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts.

Rule X, 2 Rem. Rev. Stat. §308-10, 159 Wash. lxiv:

RULE X

APPELLATE PROCEDURE

1. In civil actions and proceedings an appeal from any

final judgment must be taken within thirty days after the day of the entry of such final judgment; and an appeal from any order, other than a final order, from which an appeal is allowed, within fifteen days after the entry of the order, if made at the time of the hearing, and in all other causes within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing, or his attorney. In criminal causes, an appeal must be taken within thirty days after the entry of final judgment.

2. Within thirty days after an appeal shall have been taken by notice, as provided in this title, the clerk of the superior court shall prepare, certify and file in his office, at the expense of the appellant (except in criminal appeals prosecuted *in forma pauperis*, and in such cases at the expense of the county) a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within three months after said appeal shall have been taken by notice, as aforesaid, the clerk of the superior court shall, at the expense of appellant, send up to the supreme court said transcript together with the original briefs on appeal filed in his office. The papers and copies so sent up, together with any thereafter sent up, as herein below provided, shall constitute the record on appeal. Any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up as a part thereof, unless the superior court or a judge thereof has not yet passed on an application for the settlement and certifying of such bill or statement. In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal embracing so much thereof as the appellant deems material, or a copy thereof, may be

prepared, certified and sent up at any time prior to the hearing of the appeal. And in case the respondent deems any part of the files or record not already sent up to be material to the review of the matters embraced within the appeal, he may cause the clerk, in like manner, at his expense, to prepare, certify, and send up a supplementary record on appeal embracing such omitted files or records, or copies thereof, at any time prior to the hearing of the appeal. Any such supplementary record or records, if filed in the supreme court prior to the hearing of the appeal, shall be considered by the court as part of the record on appeal, so far as the same may be material to a review of the matters embraced within the appeal. When the review of an original paper in the cause may be important to a correct decision of the appeal, the court or judge may order the clerk to transmit the same to the clerk of the supreme court and the same shall be transmitted accordingly, and shall be under the control of the supreme court.

3. Within ninety (90) days after an appeal shall have been taken by notice, as provided herein, the appellant shall serve on the respondent three copies, and shall file with the clerk of the superior court twenty-five copies, together with proof or written admission of service, as aforesaid, of a printed brief on the appeal upon his part, which brief shall clearly point out each error that the appellant relies on for a reversal, and shall conform to such regulations of its contents in other respects, and its form and size, as the supreme court by its rules may have prescribed. Within thirty days after the service of the appellant's brief, the respondent shall likewise serve and file with the clerk of the superior court, with like proof of service, the like number of copies of a printed brief on the appeal upon his part, which shall likewise conform to the rules of the supreme court. Not less than ten days prior to the hearing, the appellant may also serve and file, either with the clerk of the superior court or in the supreme court, like printed brief or briefs, strictly in reply to re-

spondent's brief. The time for service and filing of briefs, as in this section prescribed, may be extended by order of the superior court for good cause shown, or by stipulation of the parties concerned. Either party may, after the filing of his briefs, and not less than one day prior to the hearing of the appeal, submit to the supreme court and to the adverse party a written or printed statement of any additional authorities, with suitable comment thereon strictly in support of the position taken in his brief hereinabove required to be filed. But the appellant shall not be permitted to urge in any such reply brief or statement of additional authorities, or on the hearing, any grounds for reversal not clearly pointed out in his original brief.

Rule XVII (effective March 1, 1935), 178 Wash. xxxvii:

RULE XVII

APPELLATE PROCEDURE IN CRIMINAL CASES

1. In criminal cases, in order to initiate an appeal, notice of such appeal to the supreme court shall be given in open court at the time of, or written notice of appeal shall be served upon the prevailing party and filed in the office of the clerk of the superior court within five days after the entry of, judgment or order from which the appeal is taken.

2. No appeal in a criminal case shall be effectual for any purpose unless the appellant shall, within sixty days after giving notice of appeal as hereinbefore provided, have filed or caused to be filed with the clerk of the supreme court the following:

(a) A statement of fact or bill of exceptions served on the respondent and certified by the judge of the court below according to the procedure, so near as may be, in civil cases;

(b) A transcript of record certified by the clerk of the court below, pursuant to the procedure, so near as may be, in civil cases;

(c) Appellant's abstract of record where required by the

rules of the supreme court, with proof of service thereof on the respondent;

(d) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on the respondent.

Except as herein otherwise provided, the giving of the notice of appeal, the filing in the supreme court of a certified statement of facts, certified transcript of record, abstract of record and appellant's opening brief shall be jurisdictional.

In any case where the proposed statement of facts or bill of exceptions has been filed with the clerk of the court below within sixty days after giving notice of appeal as herebefore provided, but the appellant, through no fault of his own, is unable to have the same certified in time to file the same with the clerk of the supreme court within the time herein specified, the time for such certification may, upon good cause shown, be extended by the Chief Justice of the supreme court, or, in his absence, any other judge thereof; and if such extension be granted, said Chief Justice of the supreme court or judge thereof, shall, in the same order, fix the time for filing the appellant's opening brief and abstract of record.

The appellant shall, prior to the date fixed by the clerk of the supreme court for the hearing of the appeal pursuant to the rules of the supreme court, file in the supreme court the statement of facts or bill of exceptions certified by the judge of the court below pursuant to the procedure, so near as may be, in civil cases. If not so filed, the statement of facts or bill of exceptions shall not be considered; and no question shall be reviewable on the appeal except the legal sufficiency of the indictment or information.

Whenever an appeal shall be properly filed in the supreme court in accordance with this rule, the clerk of the supreme court shall immediately send a written notice thereof to the clerk of the court below to be filed as part of the record in the

court below, and shall simultaneously send a copy of said notice to the prosecuting attorney of the county from which the appeal was taken.

3. The respondent shall, within thirty days after the service by the appellant of his opening brief, file his answering brief with the clerk of the supreme court. Not less than two days prior to the hearing, the appellant may also serve and file with the clerk of the supreme court a reply brief.

4. Whenever the appellant shall have served his proposed statement of facts or bill of exceptions upon the respondent, the respondent, within ten days after such service, may serve on the proposing party and file with the clerk of the superior court, any amendments which he may propose to the bill or statement or any objections to its certification, and at the expiration of such ten days, shall immediately return to the appellant the copy of the proposed statement of facts or bill of exceptions theretofore served upon the respondent, for use by the appellant in preparing his brief on appeal, and his abstract of record where required. In the event the respondent shall fail to return the said statement of facts or bill of exceptions to the appellant immediately upon the conclusion of such ten days, the appellant may apply ex parte to any judge of the superior court of the State of Washington or any court commissioner within the county for a summary order requiring the return to the appellant by the respondent of the said copy of the proposed statement of facts or bill of exceptions.

5. Except as otherwise provided in subdivisions one, two, three and four hereof, the rules relating to appeals in civil cases shall apply to criminal appeals, but no step in perfecting criminal appeals shall be deemed jurisdictional except those enumerated in subdivision two hereof.

RULES OF THE SUPREME COURT (effective August 1, 1938):

Rule XII, 193 Wash. 14a:

RULE XII

APPEALS IN CRIMINAL CAUSES

1. (a) In criminal causes, in order to initiate an appeal, notice of such appeal to the supreme court shall be given in open court at the time, or written notice of appeal shall be served upon the prevailing party and filed in the office of the clerk of the superior court within five days after the entry, of judgment or order from which the appeal is taken.

(b) Immediately after the giving of a notice of appeal as hereinbefore provided, the clerk of the superior court shall prepare and transmit to the clerk of the supreme court a certified copy of the judgment or order appealed from, together with a certified copy of the journal entry showing the giving of the oral notice of appeal, or a certified copy of the written notice of appeal, as the case may be, and upon receipt thereof, the cause shall be docketed by the clerk of the supreme court as a part of the state's record.

2. Whenever the appellant shall have served his proposed statement of facts or bill of exceptions upon the respondent, the respondent, within ten days after such service, may serve on the proposing party and file with the clerk of the superior court, any amendments which he may propose to the bill or statement or any objections to its certification, and at the expiration of such ten days, shall immediately return to the appellant the copy of the proposed statement of facts or bill of exceptions theretofore served upon the respondent, for use by the appellant in preparing his brief on appeal and his abstract of record, where required. In the event the respondent shall fail to return the said statement of facts or bill of exceptions to the appellant immediately upon the conclusion of such ten days, the appellant may apply *ex parte* to any judge of the superior court of the state of Washington or any court commissioner within the county for a summary order

requiring the return to the appellant by the respondent of the said copy of the proposed statement of facts or bill of exceptions.

3. No appeal in a criminal cause shall be effectual for any purpose unless the appellant shall, within sixty days after giving notice of appeal as hereinbefore provided, have filed or caused to be filed with the clerk of the supreme court the following:

(a) A statment of facts or bill of exceptions served on the respondent and certified by the judge of the superior court according to the procedure, so near as may be, in civil causes;

(b) A transcript of record certified by the clerk of the superior court, pursuant to the procedure, so near as may be, in civil causes;

(c) Appellant's abstract of record where required by the rules of the supreme court, with proof of service thereof on the respondent;

(d) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on the respondent.

Except as herein otherwise provided, the giving of the notice of appeal and the filing in the supreme court of a certified statement of facts, certified transcript of record, abstract of record, and appellant's opening brief, shall be jurisdictional.

In any case where the proposed statement of facts or bill of exceptions has been filed with the clerk of the superior court within sixty days after giving notice of appeal as hereinbefore provided, but the appellant, through no fault of his own, is unable to have the same certified in time to file the same with the clerk of the supreme court within the time herein specified, the time for such certification may, upon good cause shown, be extended by the chief justice of the

supreme court, or, in his absence, any other judge thereof; and if such extension be granted, said chief justice of the supreme court or judge thereof shall, in the same order, fix the time for filing the appellant's opening brief and abstract of record.

The clerk of the superior court, upon certification shall transmit every statement of facts or bill of exceptions to the clerk of the supreme court forthwith. By lodging the certified statement of facts or bill of exceptions with the clerk of the superior court within the time herein provided, and filing proof thereof with the clerk of the supreme court, the appellant shall be deemed to have satisfied the requirement of paragraph (a) of this subdivision. If not filed within the time prescribed by this rule, the statement of facts or bill of exceptions shall not be considered and no question shall be reviewable on the appeal except the legal sufficiency of the indictment or information.

Whenever an appeal shall be properly filed in the supreme court in accordance with this rule, the clerk of the supreme court shall immediately send a written notice thereof to the clerk of the superior court to be filed as part of the record in said court, and shall simultaneously send a copy of said notice to the attorney for the respondent.

If, upon the expiration of said sixty days after giving notice of appeal, the documents listed in paragraphs (b) and (d) of this subdivision be not on file with the clerk of the supreme court, he shall forthwith, and without the necessity of any notice to appellant or his attorney of record, note the cause upon the calendar of the supreme court for the next motion day as being a cause subject to dismissal for want of jurisdiction under this subdivision, and on said motion day the supreme court shall dismiss the said cause for want of jurisdiction.

4. The respondent shall, within thirty days after the service by the appellant of his opening brief, serve and file with

the clerk of the supreme court his answering brief. Not less than two days prior to the hearing, the appellant may also serve and file with the clerk of the supreme court a reply brief.

5. Except as otherwise provided in subds. 1, 2, 3, and 4 hereof, the rules relating to appeals in civil causes shall apply to criminal appeals, but no step in perfecting criminal appeals shall be deemed jurisdictional except those enumerated in subd. 3 hereof.

[NOTE: Amends former Rule of Practice XVII, first effective March 1, 1935; 178 Wash. xxxvii. Subdivision 1 (b) is new, first effective May 1, 1938. Subdivision 3, last paragraph, is new, first effective May 1, 1938. A defendant in a criminal action need not give a cost bond on appeal. Rem. Rev. Stat., §1721 (P.C. §7295). See *State v. Marcy*, 189 Wash. 493, 65 P.(2d) 1271 (appeal dismissed where statement of facts not filed in the supreme court in sixty days, as required by this rule).]

RULES ON APPEAL (effective January 2, 1951):

Rule 47, 34A Wn.(2d) 53; RCW vol. 0:

RULE 47

CRIMINAL CASE—APPEAL *IN FORMA PAUPERIS*

When the defendant is the appellant in an appeal to the supreme court in a criminal case and shall present to the Chief Justice of the supreme court satisfactory proof by affidavit or otherwise that he is unable to pay the filing fees in such court, the Chief Justice, if in his opinion justice will thereby be promoted, may order the filing of the appeal in this court without cost to the appellant.

Upon like proof that such appellant is unable to pay the expense of printing his brief, or briefs, the Chief Justice may also order the same to be typewritten in compliance with Rule 42(1)(c).

Proposed statements of facts in cases wherein the death penalty has been imposed shall, when the appeal is prosecuted *in forma pauperis*, be furnished to appellant at the expense of the county.

APPENDIX B

REPORT OF SPECIAL COMMITTEE OF SUPERIOR COURT JUDGES ASSOCIATION APPOINTED TO STUDY *GRIFFIN v. ILLINOIS*

SUPERIOR COURT JUDGES' ASSOCIATION
822 County-City Building
Seattle 4, Washington

February 28, 1958

Mr. Robert W. Graham
Bogle, Bogle & Gates
603 Central Bldg.
Seattle 4

Dear Sir:

I enclose herewith for your reference and use a copy of a report of a special committee of this Association appointed to study the case of *Griffin v. Illinois*. This special committee, appointed by the President-Judge of the Association, consisted of the Honorable Theodore S. Turner, chairman; the Honorable Hugh Todd and the Honorable H. G. Sutton, all members of the Superior Court bench of this state.

The report was received at the last annual meeting of the Superior Court Judges' Association on August 30, 1957. You are welcome to make any use of it that you desire.

Very truly yours,

EUGENE A. WRIGHT, Secretary.

EAW:1/Enc.

REPORT OF SPECIAL COMMITTEE APPOINTED TO STUDY *GRIFFIN v. ILLINOIS*

HONORABLE HOBART S. DAWSON, President-Judge:

We, your special committee appointed to study and report on *Griffin v. Illinois*, 351 U.S. 12, 100 L.ed. 891, 76 S.Ct. 585, have construed our assignment to embrace an analysis of the holding of the United States Supreme Court and an appraisal of its impact on Washington law. In this report we are not concerned with the merits or criticisms of the variant views expressed in the four separate opinions in the case, no one of which obtained the adherence of a majority of the court.

Griffin v. Illinois held that the refusal of a state to furnish indigent defendants a free transcript of the trial proceedings for use on appeal was, under the circumstances, a violation of the due process and equal protection clauses of the United States Constitution. In that case defendants Griffin and Crenshaw had been convicted of armed robbery in the Criminal Court of Cook County, Illinois. They then moved the trial court that they be furnished the entire record, including a stenographic transcript, without cost to them, alleging that they were indigents and unable to pay for it themselves, that their convictions were invalid because of trial errors, and that such record was necessary to obtain adequate review. These allegations were not controverted by the state. The motion was denied without a hearing. A subsequent petition for similar relief was also denied, and the Illinois Supreme Court affirmed. The United States Supreme Court granted certiorari. In that court, the state conceded that defendants needed a stenographic transcript in order to get adequate appellate review, for the narrative or "bystanders'" bill of exceptions was never used in practice. The court, therefore, had to "assume for the purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get

appellate review of those errors solely because they were too poor to buy a stenographic transcript." A majority of five judges, although recognizing that a state was not bound to provide any appellate review in criminal cases, nevertheless held that if it did so it was not free to administer its law in such manner that only those appellants who could afford to pay for the record could obtain review, while those who had no money were denied any relief. The judgment of the Supreme Court of Illinois was therefore vacated and the cause remanded for further proceedings not inconsistent with the following paragraph:

> "The Illinois Supreme Court denied these petitioners relief under the Post-Conviction Act because of its holding that no constitutional rights were violated. In view of our holding to the contrary the State Supreme Court may decide that petitioners are now entitled to a transcript, as the State's brief suggests. . . We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare." (351 U.S. 19, 20; 100 L.ed. 899).

Four separate opinions were filed. Mr. Justice Black, with the Chief Justice and Justices Douglas and Clark concurring, held that "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance"; that all of the

states now provide some method of appeal from criminal convictions, and that a substantial proportion of convictions are reversed. Many states have provided aid to convicted defendants who "need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (351 U.S. 18, 19; 100 L.ed. 898, 899).

The foregoing language is much broader than necessary to pass upon a timely application for a free transcript in aid of an appeal. It could well be used in aid of a petition for a writ of *habeas corpus* by an indigent convict long after his appeal rights had expired, even though he had not at the time applied for a free transcript. This was recognized by Mr. Justice Frankfurter who filed a separate opinion concurring in the judgment, but expressing the view that this decision announced a new rule which should not be applied retroactively. He says:

> "We must be mindful of the fact that there are undoubtedly convicts under confinement in Illinois prisons, in numbers unknown to us and under unappealed sentences imposed years ago, who will find justification in this opinion, unless properly qualified, for proceedings both in the state and the federal courts upon claims that they are under illegal detention in that they have been denied a right under the Federal Constitution. It would be an easy answer that a claim that was not duly asserted—as was the timely claim by these petitioners—cannot be asserted now. The answer is too easy. Candor compels acknowledgment that the decision rendered today is a new ruling. Candor compels the further acknowledgment that it would not be unreason-

able for all indigent defendants, now incarcerated, who at the time were unable to pay for transcripts of proceedings in trial courts, to urge that they were justified in assuming that such a restriction upon criminal appeals in Illinois was presumably a valid exercise of the State's power at the time when they suffered its consequences. Therefore it could well be claimed that thereby any conscious waiver of a constitutional right is negatived."

In his view, the court, when announcing a new rule, had power to define its scope and limits, and should in the present case give it prospective application only (351 U.S. 25, 26; 100 L.ed. 902, 903).

Mr. Justice Frankfurter also recognized the right of a state to impose reasonable conditions on its aid to indigent appellants, as follows:

"But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong.

"When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process." (351 U.S. 24; 100 L.ed. 901).

Mr. Justice Burton, with the concurrence of Justices Minton, Reed and Harlan, dissented in an opinion holding that when a state provided appellate review in criminal cases it could make reasonable classifications; that Illinois' classification, which provided a free transcript to indigents in capital cases but not in noncapital cases, was reasonable;

and that the equal protection clause of the Federal Constitution did not require a state to make defendants economically equal before the bar of criminal justice. This opinion also construes the rule announced by Mr. Justice Black to invalidate past convictions where the state failed to furnish a free transcript to indigent defendants who sought to review trial rulings dependent upon the evidence (351 U.S. 27-29; 100 L.ed. 903, 904).

Mr. Justice Harlan filed an additional dissenting opinion contending that the record was inadequate to present the constitutional questions decided, because a reporter's transcript was not necessary under Illinois law, and because even the nature of the alleged trial errors was not disclosed. However, assuming the constitutional questions were properly presented, he felt that the equal protection clause did not require the states to eliminate the effects of differing economic circumstances in the area of criminal appeals, and that the failure to provide a free transcript could not be characterized as so fundamentally unfair as to constitute a denial of due process. (351 U.S. 29-39; 100 L.ed. 904-909).

Additional light on the scope and effect of the *Griffin* decision may be found in subsequent federal and state cases. In the *Griffin* case itself, the Illinois Supreme Court ordered the trial court to provide the defendants with a transcript in full, and allowed them to proceed with their appeal. It also amended its court rules to provide that all persons sentenced after April 23, 1956 (the date of the *Griffin* decisio) would be entitled to a free transcript for use on appeal, on a showing of indigence, and that all indigent prisoners sentenced before that date and desiring review should be provided a transcript at state expense, the rule limiting the time would be inapplicable to them, and their convictions would be reviewed on writ of error. See *People v. Griffin*, 9 Ill.(2d) 164, 137 N.E.(2d) 485; *United States ex rel. Peckham v. Ragen* (CA 7) 241 F.(2d) 318, 320.

In New York, there does not appear to be a decision by the Court of Appeals subsequent to the *Griffin* decision; there are conflicting rulings in the lower courts. See: *People v. Jackson*, 152 N.Y.S.(2d) 893 (transcript granted); *People v. Lumpkin*, 158 N.Y.S.(2d) 610 (denied); *People v. Strong*, 159 N.Y.S.(2d) 351 (granted); same case on rehearing, 159 N.Y.S.(2d) 352 (denied).

In the *Griffin* case, the United States Supreme Court noted that the state did not deny defendants' allegations that reversible error was committed at their trial. It is at least doubtful that the holding would have been any different had the alleged error been denied. This appears from two Supreme Court decisions involving the Act of Congress of June 25, 1910, 28 U.S.C.A., §1915, which provides for an appeal *in forma pauperis* unless "the trial judge certifies in writing that it (the appeal) is not taken in good faith." In the first of these cases, *U.S. v. Johnson* (CA 2), 238 F.(2d) 565, the defendant had been convicted after a five-day trial and sentenced to three years. (The nature of the charge does not appear.) He petitioned for leave to appeal *in forma pauperis*, alleging that "many prejudicial errors were committed against me and I therefore need the records and minutes to present them" to the Circuit Court of Appeals. No particulars concerning the alleged errors were given, nor was their nature disclosed. The trial judge certified that the issues were simple, the jury was properly instructed, the evidence supported the verdict, and that the appeal was frivolous, lacking in merit and not taken in good faith. The Court of Appeals affirmed by a divided court. The majority distinguished *Griffin v. Illinois* because it had assumed reversible trial errors, and held that in the instant case the trial court's certificate that the appeal was frivolous was final, in the absence of a showing that the trial judge acted without warrant or not in good faith. Judge Frank dissented, holding that to deny defendant an opportunity to demonstrate the error was discrimination in violation of

the rule of the *Griffin* case; that defendant was entitled to a transcript or to a narrative statement certified by the trial judge, and to the assistance of counsel. Then follows an extended and well-documented discussion of the problem of making justice available to the poor. The United States Supreme Court granted certiorari and vacated the judgment of the Circuit Court of Appeals; *Johnson v. United States,* 352 U.S. 565, 1 L.ed.(2d) 593, 77 S.Ct. 550. The Supreme Court held that the trial judge's certification that the appeal is not taken in good faith carries great weight, but it is not final in the sense that the defendant is barred from showing that it is unwarranted. The defendant should be afforded counsel in his effort to make such showing, and should be enabled to show that the grounds of the appeal are not frivolous. The court said:

> "This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. It is essential, however, that he be assured some appropriate means—such as the district judge's notes or an agreed statement by trial counsel—of making manifest the basis of his claim that the District Court committed error in certifying that the desired appeal was not pursued in good faith."

The second case referred to is *U.S. v. Farley* (CA 2) 238 F.(2d) 575. Defendant had been convicted of bank robbery, and moved for leave to appeal *in forma pauperis.* The trial court denied it, certifying that defendant had failed to show merit in the appeal; the court did not certify that it was not taken in good faith. Defendant then moved the Court of Appeals for leave, alleging several errors not raised below. That court denied the motion, with leave to renew the application in the trial court. Judge Frank concurred in the remand but dissented in part, saying that defendant should have the assistance of counsel appointed by the court, and should be furnished gratis with a transcript or other adequate record. On remand, the trial court appointed counsel

to assist defendant, but did not furnish the record. The trial court denied the motion to appeal *in forma pauperis*, and certified that the appeal was not taken in good faith. Defendant again moved the Court of Appeals, which denied the motion by unanimous vote; 242 F.(2d) 338 (Judge Frank had died in the meantime). This judgment was vacated by the United States Supreme Court: *Farley v. United States*, — U.S. —, 1 L.ed.(2d) 1529, 77 S.Ct. —. The court noted that defendant's allegations of trial errors were denied by the Government, and held:

> "As things now stand conflicting affidavits have been introduced concerning petitioner's contention of errors at the trial. If the allegations made by petitioner and his counsel are correct then it seems quite clear to us that his appeal cannot be characterized as frivolous. Before his allegation of errors can be accurately evaluated, however, to ascertain if they do have any merit he should be furnished with a transcript of the trial record—unless counsel can agree on a statement of the relevant facts or some other means are devised to make the minutes of the trial available to petitioner—so that he has an opportunity to substantiate his allegations and point out their significance and so that they can be appraised on a dependable record."

In Washington, our Supreme Court set an early precedent for furnishing a free transcript to an indigent defendant under sentence of death: *State ex rel. Coella v. Fenimore*, 2 Wash. 370.

Legislative authorization for a reporter's transcript at public expense was first enacted in 1913 as a proviso to section 5 of the statute authorizing official court reporters, which has been continued without substantial change to the present time. As last amended, the proviso reads:

> "*Provided*, That when the defendant in any criminal case shall present to the judge presiding satisfactory proof by affidavit or otherwise, that he is unable to pay

for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript fee therefor shall be paid out of the county treasury as other expenses of the court are paid." (L. 1913, c. 126 §5; L. 1943, c. 69 §4; L. 1957, c. 244 §4; R.R.S. 1943 Supp. §42-5; R.C.W. 2.32.240).

It will be noted that this statute makes no distinction between capital and noncapital cases, and that the furnishing of a transcript at county expense is within the court's discretion. Our Supreme Court has consistently held that it will not interfere with the trial court's discretion in granting or denying a free transcript, unless an abuse is manifest:

State ex rel. Marr v. Superior Court, 163 Wash. 459;

State ex rel. Bird v. Superior Court, 30 Wn.(2d) 785, 788, 789 (death sentence; reporter's transcript refused);

State v. Perkins, 32 Wn.(2d) 810, at p. 866;

In re Mason v. Cranor, 42 Wn.(2d) 610, 614;

State v. Moorison, 43 Wn.(2d) 23, at p. 35.

Since the statute relates to official court reporters, it would apply only in those counties and judicial districts having them. Chapter 244, Laws of 1957, requires the appointment of official court reporters in counties and judicial districts of over 35,000 population, and permits it in any county or judicial district having a population of over 25,000 and less than 35,000. The statute also authorizes the judge in a district having less than 25,000 population to appoint an official reporter if he finds that the work in his district requires. According to the 1950 census, there were then six judicial districts with less than 35,000 population.

Rule 47 of the Rules on Appeal (34A Wn.(2d) 53), relating to criminal appeals *in forma pauperis,* makes a statement of facts at county expense mandatory in cases wherein the death penalty has been imposed; and in other cases it

authorizes the Chief Justice, in his discretion, to dispense with payment of clerk's fees and to permit typewritten briefs. Dispensing with the clerk's fees is also authorized by statute in language similar to Rule 47: See R.C.W. 2.32.080.

To summarize Washington law as announced by statute and court rule prior to the *Griffin* case, it provided that a trial judge must order a proposed statement of facts to be furnished, at county expense, to a defendant who appeals *in forma pauperis* in cases where the death penalty has been imposed. In all other cases arising in judicial districts where there is an official reporter, the trial judge had discretion to order a transcript, at county expense, for an indigent appellant, where in his opinion justice would thereby be promoted. This discretion included not only the right to pass on the sufficiency of the showing of indigence and the form and contents of the statement of facts necessary for review of the claimed errors, but also whether there was a sufficient showing of merit to justify prosecution of the appeal. In judicial districts not having an official reporter, there was no clearly announced policy in cases not capital.

Griffin v. Illinois has made no change in Washington law so far as cases involving the death penalty are concerned. It has not taken away the right of the state, acting through the trial judge, to "protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." (351 U.S. 24). Consequently, if the trial judge determines that there is not a showing of alleged trial errors claimed in good faith to be fatal defects resulting in a potentially reversible conviction, he may deny a transcript at public expense. And it seems obvious that Rules on Appeal 46 and 47 are sufficient to meet every constitutional test in cases where the claimed errors do not involve trial proceedings but appear on the face of the clerk's record. *Griffin v. Illinois* does make a substantial change in Washington law, however, with respect to noncapital cases *in forma pauperis*

in which there is a *bona fide* claim of reversible error and a showing that such record is necessary for appellate review; in such cases, the trial judge no longer has discretion to refuse an adequate record. And this is true, even though the state may deny that there was error or that it was prejudicial.

There is nothing in the *Griffin* decision to deny to the trial court the duty to exercise its discretion in determining whether a reporter's transcript is in fact necessary for an adequate review. Thus, the court may properly require some specification of the claimed error in order to determine whether or not it arises in connection with rulings on evidence or other proceedings at the trial, and if so, how much thereof need be certified in order to obtain adequate review. See Rules on Appeal 34 and 46. And it is clear that where trial errors are claimed, the court has discretion to determine whether a reporter's transcript is necessary or whether a narrative summary or an agreed statement would suffice. A narrative statement, when properly certified to contain all the material facts, matters and proceedings, is sufficient for adequate review, and in such cases a reporter's transcript cannot be compelled: *State ex rel. Miles v. Superior Court*, 13 Wash. 514; *State ex rel. Roberts v. Clifford*, 55 Wash. 440: *State v. Evans*, 145 Wash. 4, at p. 18; *State ex rel. Larpenteur v. Superior Court*, 183 Wash. 252; *Palin v. General Construction Co.*, 45 Wn.(2d) 721. Cf. *Morgan v. Chittenden Land Co.*, 92 Wash. 364.

The foregoing considerations would indicate that when a convicted defendant petitions for leave to appeal *in forma pauperis* and asks for a reporter's transcript at county expense, the following procedure would be proper:

(1) Ascertain whether the claimed errors appear on the face of the record, or arise out of trial proceedings. Incorporate in the record, in some appropriate fashion, defendant's specification of errors claimed, if any, or if none, then the fact that defendant is unable to specify any alleged error.

(2) Where error is claimed with respect to trial proceedings, determine whether it may be adequately shown by summary statement in narrative form, by agreed statement, or whether a reporter's transcript is necessary. Rule on Appeal 34 (3), providing for appeal on a short record, and *id.* 34 (4), relating to appeal on an agreed statement of facts, should be utilized where appropriate.

The North Dakota case of *State v. Moore*, 82 N.W.(2d) 217 (decided April 1, 1957), furnishes support for the foregoing views, and illustrates a situation in which a transcript at public expense may properly be denied. In that case defendant was convicted of murder in the second degree, after a nine-day trial. He moved for a new trial and sought a reporter's transcript to enable him to support his new trial motion, and to use on appeal if necessary; and he filed a pauper's affidavit. The trial judge, in denying the motion for a free transcript, said:

> "In this case defendant has not in the instant motion specifically set out what issues he desires to raise on appeal . . . I know of no prejudicial error in the record . . . It may well be that such issues can be raised by a short statement of the case without a transcript or with only a small portion of the proceedings at the trial and surely so without any necessity of transcribing some eight or nine days of testimony."

On appeal, the question was whether the refusal of a free transcript was a violation of the due process and equal protection clauses. North Dakota law was substantially similar to Washington law with reference to procedure on appeal. The Supreme Court affirmed, saying that not all errors require a reporter's transcript; the judgment roll, a bill of exceptions, or a synopsis of the testimony may be sufficient to provide adequate review. If the errors of which a defendant complains can be made part of the record without a reporter's transcript, his right of appeal would not be limited by the lack of one.

"The requirement, therefore, that an indigent defendant in his application to the court for a transcript, to be prepared at public expense, make some showing that the proceedings, upon which he asserts error, cannot be made a part of the record upon appeal without such transcript, is a reasonable one and does not discriminate against the defendant or deny his equal protection of the law." (p. 220)

The court further held that if the defendant makes a reasonable showing that a transcript is necessary, the North Dakota statute authorized the court to order one for him, but that in the case at bar such a showing had not been made. The court accordingly affirmed.

Respectfully submitted,

H. G. SUTTON
HUGH TODD
THEODORE S. TURNER, *Chairman*

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MAY 1 0 1958

JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

NO. 96

TOM ESKRIDGE, *Petitioner,*

v.

WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1956

CERTIORARI GRANTED APRIL 1, 1957

BRIEF OF RESPONDENT

JOHN J. O'CONNELL,
Attorney General,

HAYDN H. HILLING,
Assistant Attorney General,

Attorneys for Respondent.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

NO. 96

TOM ESKRIDGE, *Petitioner*,

v.

WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1956

CERTIORARI GRANTED APRIL 1, 1957

BRIEF OF RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutions and statutes cited by petitioner, the respondent will rely upon the Tenth Amendment to the Constitution of the United States, which reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the

states, are reserved to the states respectively, or to the people."

and upon Act of June 25, 1948, chapter 646, § 1, 62 Stat. 967, 28 U. S. C. A., § 2254, which reads as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

QUESTIONS PRESENTED

The question presented by petitioner assumes too much (Br. 5). Assuming, without admitting, that petitioner was entitled to a stenographic transcript at public expense, the question remains whether he can raise this point now. The questions, then, are:

(1) Is the decision in *Griffin v. Illinois*, 351 U. S. 12, to be given retroactive application?

(2) Should *Griffin v. Illinois* be reconsidered?

(3) Was it possible for the petitioner to perfect his appeal without submitting a stenographic

transcript, and, if so, was he entitled to financial assistance and judicial direction in so doing?

(4) Assuming, without admitting, that the question of the right to counsel upon appeal is before this court, is an indigent defendant entitled to counsel at public expense upon his appeal from a criminal conviction (a) at all, and (b) where he elects to act *pro se*?

STATEMENT

Petitioner's statement appears to be accurate. However, we are surprised that he claims the right to counsel upon his appeal from his criminal conviction. No such claim was advanced in the petition for certiorari here, or at all in the court below. Moreover, certain facts pertaining to this claim are significant:

Prior to the trial, petitioner called in the law firm of Donovan & Donovan (Affidavit of A. J. Donovan, R. 60-61). He told the attorneys he wanted a speedy trial; that ten days would suffice within which to prepare (ibid. R. 60). When his efforts to secure funds failed, he asked the law firm to secure a court appointment, which it did (ibid. R. 60). He thereafter *refused to cooperate* with his attorneys (ibid. R. 61). Moreover, he suggested only *two* Spokane witnesses and *one* Portland witness, no others (ibid. R. 61). The attorneys interviewed the Spokane witnesses to no avail, and learned that the Portland witness could be of no assistance (ibid. R. 61).

After the trial, petitioner complained that his attorneys had *refused* to call a certain witness to prove "perjury" on the part of a certain state witness (Letter, petitioner to trial judge, 1/2/36, R. 46-47); and that they had failed to call various witnesses from Spokane, Seattle, and Walla Walla (ibid. R. 47). He criticized his counsel for admitting upon the argument that he had been in the possession of a certain automobile (presumably a judicious admission) (ibid. R. 47). He asked for new counsel to argue the motion for a new trial, upon the ground his attorneys had failed to consult him concerning that motion (Affidavit in Support of Petition for Writ of Mandate, 4 14 36, R. 70-71); and thereafter his counsel withdrew *at his request* (R. 77). *He then decided to act in his own behalf* (Petition for Writ of Mandate, R. 69); and informed the Supreme Court of the State of Washington that he would act *pro se* (R. 67, last paragraph).

There is not a word in the record to suggest that he even desired counsel on appeal, let alone that he asked for it. On the contrary, he was evidently tired of lawyers and did not want one.

Nowhere in the record does the petitioner proclaim his innocence.

SUMMARY OF ARGUMENT

The decision in *Griffin v. Illinois* should be limited to a prospective application. Petitioners who fail to exhaust their state remedies in direct attack upon their judgments of conviction have no standing to seek review here. An application for writ of certiorari out of this court to review the judgment affirming the conviction is a part of the state remedy. The petitioner in this case did not avail himself of this remedy in 1936 although he was able to do so.

The decision in *Griffin v. Illinois* should be reconsidered. It is to be presumed that a convicted defendant has had a fair trial. The burden is upon him to perfect his appeal and to establish error. The presentation of a satisfactory record of the proceedings below constitutes the preparation of his case for review. An exorbitant filing fee is distinguishable from the expenses of preparing a reasonable record of the trial. The Anglo-American tradition has never required the state to defray expenses of preparation for trial; and there is less reason to require it to stand the expenses of appeal. The sense of the people concerning the basic elements of fairness at the time of the adoption of the Fourteenth Amendment did not include the relief requested by the petitioner. The costs of appeal may be prohibitively burdensome to many who are unable to take a pauper's oath. The decision in *Griffin v. Illinois* should be limited to cases where the state imposes an unreasonable requirement for the perfecting of an appeal.

It was assumed for the purposes of decision in *Griffin v. Illinois* that the petitioners could not have secured an adequate review without a stenographic transcript of the evidence. The majority, nevertheless, held that should a transcript prove unnecessary upon remand the state would not be required to purchase one. The law in Washington, established by an unbroken line of authorities since the turn of the century, establishes that a transcript is *never required* as a prerequisite to an adequate appeal. Consequently, the provision of the Washington statute authorizing the trial judge to furnish a transcript at public expense is immaterial to this case. Failure to provide the transcript deprived the petitioner of no constitutional right.

Petitioner cannot raise the question of counsel because he has not raised this point in his petition for certiorari or in the jurisdictional statement. At all events, he waived any right he may have had by dismissing his trial counsel and electing to proceed alone. His ability is demonstrated by the records herein and by the petition for certiorari on file in this case, which he prepared *pro se*. We therefore do not reach the question as to whether a defendant is entitled under any other circumstances to free counsel on appeal from a state conviction. The nature and history of appellate review dispense, however, with any such constitutional requirement.

ARGUMENT

THE DECISION IN GRIFFIN V. ILLINOIS SHOULD BE LIMITED TO A PROSPECTIVE APPLICATION

The doctrine should be limited in scope to petitioners here on certiorari from judgments affirming their convictions, or to petitioners who have previously exhausted their remedy of direct attack upon the judgment of conviction.

The sole question presented by petitioner is whether he is entitled to a free transcript now, of the record that was made in 1935. The petition for certiorari states the question as follows:

> "Is the trial Court's discretionary denial of the indigent defendant's application for the Trial Transcript a denial of the said defendant's constitutional right to appeal as is indicated by the petition for a Writ of Habeas Corpus (Exhibit #2) filed in the Supreme Court of the State of Washington? There is involved here petitioner's rights under Article I, Section 22, 10th Amendment Supplement (Exhibit #10) of the Constitution of the State of Washington; Section 1 of the Fourteenth Amendment of the Constitution of the United States; and by the recent ruling of this Honorable Court in the case of Judson Griffin and James Crenshaw v. The People of the State of Illinois, No. 95—October Term, 1955. The Supreme Court of the State of Washington was in error in not holding that petitioner was entitled to the writ or to a hearing on the basis of the allegations in the petition hereto attached (Exhibit #2)."

In his petition for writ of habeas corpus, the petitioner alleged certain trial and pre-trial errors *in*

support of his request for a transcript. But he nowhere requests habeas corpus on any ground *except* refusal to furnish a transcript (R. 6-14). Consequently, he cannot raise the question of constitutional error at the trial, upon this proceeding. Rule of Supreme Court 40(2). There is no question here, therefore, of the regularity of any of the proceedings leading to judgment. The judgment is presumed to have been valid. *Ventress et al. v. Smith*, 10 Pet. (U. S.) 161, 9 L. ed. 382; *Bechtel v. U. S.*, 101 U. S. 597; see also generally, 3 Am. Jur., Appeal and Error, §§ 924, 925.

This court can hardly grant the relief requested, i.e., order a free transcript at the expense of Spokane County or of the State of Washington (Br. 49). In *Griffin v. Illinois*, petitioner came to this court by way of a direct attack upon the judgment, pursuant to the Illinois Post-Conviction Hearing Act. Here, he asks habeas corpus. It would seem that the relief, if any, must consist of an order to release the petitioner, conditioned upon the furnishing of a transcript.

Habeas corpus is not possible where the petitioner did not exhaust his remedies in a direct attack upon the judgment, except where the claim of constitutional error inhered in a matter outside the record, e.g., mob domination, etc. Where claim of error shows upon the record, the petitioner *must exhaust his remedies in the state court in a direct attack upon the judgment*, or be forever barred. *Brown v. Allen*,

344 U. S. 443; *Sunal v. Large*, 332 U. S. 174; *Goto v. Lane*, 265 U. S. 393. See also *Ex Parte Hawk*, 321 U. S. 114, and *Darr v. Burford*, 339 U. S. 200, concerning the right to a writ in federal court. The exhaustion of state remedies includes an application to this court for certiorari. *Darr v. Burford*, 339 U. S. 200, *supra* (construing 28 U. S. C. A., § 2254, set out verbatim, *supra*, page 1).

In *Goto v. Lane*, 265 U. S. 393, *supra*, the appellants failed to perfect an appeal to the Supreme Court of the Territory of Hawaii. They sought instead a review of exceptions, which review was decided adversely to them. Having failed to appeal to the Supreme Court of Hawaii, however, writ of error to this court did not lie. They then sought habeas corpus out of the District Court for Hawaii. That court denied the application, and this court affirmed upon the ground that having failed to pursue their direct attack upon the judgment *all the way to this court*, they had failed to exhaust their remedies against the judgment. The court said (265 U. S., page 402):

> "* * * And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to *habeas corpus* as a substitute. * * *"

In *Brown v. Allen*, 344 U. S. 443, *supra* (Case No. 20 therein), petitioners had incurred the death penalty. They claimed to have been tried by a jury

from which members of their race had been systematically excluded. They served their statement of the case on appeal to the Supreme Court of the State of North Carolina *one day late.* (344 U. S., pages 484-485.) Although the full trial record was before that court, it refused to consider the appeal on its merits. Ibid. They then applied to this court for certiorari to review the state supreme court's refusal to consider their appeal on the merits. (344 U. S., page 446.) This petition was denied. They then applied to the district court for a writ of habeas corpus, which was denied. The circuit court affirmed, and this court granted certiorari. This court then affirmed the district court upon the ground the petitioners had failed to exhaust their remedies of appeal to the supreme court of the state, notwithstanding the fact that the remedy was no longer available to them. The court said (344 U. S., pages 485-486):

> "Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials. Also, this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible. Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings. Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. *Such failure, of course, bars*

subsequent objection to conviction on those grounds." (Emphasis supplied.)①

Although petitioner herein did not have counsel upon the appeal, it is to be remembered that he elected to proceed alone. Nevertheless, he apparently had his case better in hand than did the attorneys for the condemned defendants in *Brown v. Allen.*②

In *Sunal v. Large*, 332 U. S. 174, *supra*, the petitioner had been convicted under the Selective Training and Service Act of 1940. He did not take an appeal from his judgment of conviction because it appeared under existing law to be futile. Thereafter, certain cases were decided which afforded a defense to the charge, and the petitioner sought habeas corpus from the district court. The writ was denied, and this court affirmed. Since this case involved the federal courts, and since it does not appear that a clear constitutional question was presented, it is not directly in point, but its *rationale* is valuable and supports the position taken in *Griffin v. Illinois*, by Mr. Justice Frankfurter, concerning the prospective application of that case. It also holds

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①The court below rendered no opinion upon the denial of petitioner's application for habeas corpus. Consequently, this Court cannot assume that it would treat habeas corpus as permissible. This Court is without jurisdiction where the existence of an adequate state ground is debatable. See *Bachtel v. Wilson*, 204 U. S. 36, Annotation 100 L. ed. 1200.

②It is significant that in *Brown v. Allen*, the *trial judge* struck the appeal as out of time. Apparently, this action precluded an appeal to the state supreme court. It would appear that the judge's act was discretionary. See 344 U. S., pages 484-485.

directly upon the inviolability, absent direct attack, of a judgment that was valid when rendered. In that case, the court said (332 U. S., pages 178, 181-182, 183-184):

> "* * * The argument is that since the state of the law made the appeals seem futile, it would be unfair to those registrants to conclude them by their failure to appeal." (p. 178)
>
> "* * * Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile.
>
> "We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. Cf. *Warring v. Colpoys*, *supra*. If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implica-

tions. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus, litigation in these criminal cases will be interminable.* Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court." (pp. 181-182)

"* * * These registrants had available a method of obtaining the right to defend their prosecutions under § 11 on that ground. *They did not use it. And since we find no exceptional circumstances which excuse their failure, habeas corpus may not now be used as a substitute.*" (pp. 183-184) (Emphasis supplied.)

The rule for which we contend has been favorably discussed as follows (Note, 61 Harvard Law Review 657, 666, 1947-1948):

"'Exhaustion' may, however, connote a more extreme requirement than that of no other presently available remedy. * * * There are Court indications that 'exhaustion' has the extreme meaning here suggested. In the *Sunal* case, the Court discussion of 'exceptional circumstances' indicated that its normal exhaustion rule would not permit federal habeas corpus where appeal had not been sought, *though appeal was no longer available.*" (Emphasis supplied.)

The social implications of a retroactive application of *Griffin v. Illinois* are most serious. In the Tenth Amendment to the Constitution of the United States, the states have reserved the undelegated

powers. The right to protect its citizens against violence and crime is inherent in this reservation. The federal government does not have the power to aid in the maintenance of law and order (except possibly in circumstances not relevant here). The release of countless convicted prisoners for the reason that a free transcript was not available at the time of their conviction seems unnecessary to the just administration of criminal law, especially in a country where criminal appeals were not allowed in federal courts for one hundred years.

It seems evident, however, that failure to seek certiorari here in direct attack upon the 1935 judgment precludes habeas corpus now. This, of course, the petitioner could have done. He has demonstrated his ability by doing so *pro se* in this proceeding. (See Petition for Writ on file herein.)

The Decision in Griffin v. Illinois Should Be Reconsidered

This case seems to follow directly upon *Griffin v. Illinois*, 351 U. S. 12, *supra*. Our research has disclosed no intervening case out of any state. Its impact upon the administration of criminal justice within the states can be severe. Consequently, and since that case was decided by a divided court with four justices dissenting, we ask the court to reconsider that decision.

The decision seems to have rested upon four principal hypotheses: (a) There is no distinction between the requirement of a fee at the trial, and

the requirement of costs on appeal; (b) expense of a transcript, though reasonably necessary to the presentation of appellant's case, is a cost imposed by the state; (c) to require such payment of an indigent appellant is shocking to the universal sense of justice; and (d) destitute appellants must be afforded as adequate appellate review as those who are able to pay for transcripts (351 U. S., page 19).

The validity of the judgment of a court of competent jurisdiction is invariably presumed. *Darr v. Burford*, 339 U. S. 200, 218; *Ventress et al. v. Smith*, 10 Pet. (U. S.) 161, 9 L. ed. 382; *Bechtel v. U. S.*, 101 U. S. 597; see also generally, 3 Am. Jur., Appeal and Error, §§ 924, 925. Every appellant must overcome the presumption of regularity in order to secure a reversal of a judgment. 3 Am. Jur., Appeal and Error, § 925, *supra*. He bears the affirmative burden of showing error, *by the record which he presents to the appellate court*. 3 Am. Jur., Appeal and Error, § 925, *supra*, notes 4 and 5. As a matter of fact, the appeal is a new action commenced by the defendant.

We submit that the presentation of a satisfactory account of the proceedings below is nothing but the preparation and presentation of his case for review. He is obliged to meet this burden at the trial. There is no Anglo-American tradition requiring the state to bear the expense of preparation for trial *even though the trial is to culminate in the adjudication of guilt or innocence*, something which never happens

upon appeal. This expense can be substantial and crucial. At times, the services of a professional investigator are necessary in order to meet the state's evidence, or witnesses must be brought from far off, or the defendant must advance sums to defray the expense of counsel in the interviewing of witnesses and the securing of demonstrative evidence. The fact that the Anglo-American tradition has never required the state to defray such expenses would seem a sufficient answer to any claim that due process required it to do so now. *Betts v. Brady*, 316 U. S. 455. And this seems an equal answer to petitioner's claim upon public funds with which to defray the expenses of presenting his case for review.

Thus, we must distinguish between an exorbitant filing fee on the one hand, and the expense incident to presentation of one's case, on the other. The first, is a tax so to speak upon the right to use the court. It affirmatively denies equal availability of judicial review. An onerous and unreasonable requirement of a transcript might fall into this category. But the fact that the cost of presentation may exceed the amount of a fee which itself would be exorbitant, is not material.

Reference to the Fourteenth Amendment seems clearly to confirm this argument:

> "* * * No state shall * * * *deprive* any person of * * * liberty * * * without due process of law; nor *deny* to any person * * * the equal protection of the laws." (Emphasis supplied.)

This must be construed in accordance with the sense of the people concerning the elements of fairness at the time it was adopted. *Betts v. Brady*, 316 U. S. 455. There is no claim that *in forma pauperis* appeals were established anywhere, contemporaneously with the right of appeal. (See dissenting opinion of Mr. Justice Harlan in *Griffin v. Illinois*, 351 U. S. 12, 38.) At the time of the decision in *Griffin v. Illinois*, it appears that some nineteen states had made no provision for free transcripts. (See ibid., 351 U. S., page 33.) Failure to make such provision can hardly be shocking to the universal sense of justice, under these circumstances. *Betts v. Brady*, 316 U. S. 455, *supra*.

If an indigent is entitled to the same adequacy of review as one able to buy a transcript, then sorry indeed is the plight of those who are able to pay, but who find the total cost of appeal beyond their reasonable means. The cost of transcripts, briefs and counsel may be staggering to a man who is nevertheless unable to take a pauper's oath. The chance of success may not warrant the burden on his limited means. Is he entitled to less consideration than the pauper? We submit it is impossible to equalize the position of defendants before the bar of justice. The state has done its duty when it imposes no barrier.

We respectfully submit that the decision in *Griffin v. Illinois* should be reconsidered, and limited to cases where the state imposes an unreasonable requirement for perfecting an appeal.

The Laws of the State of Washington Provide Full Appeal Without a Stenographic Transcript of the Evidence; in Perfecting Such an Appeal Petitioner Was Not Entitled to Financial Assistance or to Unsolicited Judicial Direction.

Griffin v. Illinois requires nothing, except the purchase of a stenographic transcript on behalf of an indigent defendant, and this, only where necessary to perfection of the appeal under applicable state law.

It was assumed by the court for purpose of the decision that the petitioners could not have secured an appellate review in the State of Illinois without a stenographic transcript of the evidence. *Griffin v. Illinois*, 351 U. S. 12, 16. Counsel for both sides acquiesced in this assumption. In adopting this assumption as a basis for decision, the majority stated (351 U. S. page 16):

> "Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors. There is no contention that petitioners were dilatory in their efforts to get appellate review, or that the Illinois Supreme Court denied review on the ground that the allegations of trial error were insufficient. We *must therefore assume for purposes of this decision* that errors were committed in the trial which would merit reversal, but that the petitioners *could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript.* * * * " (Emphasis supplied.)

The majority then held that if a stenographic transcript should prove unnecessary to the perfection of

the appeal upon remand, the state would *not* have to purchase one. *Griffin v. Illinois*, 351 U. S. 12, 20. *There is not one word in the opinion to require the State of Illinois, or any other state, to pay the cost of anything except a stenographic transcript; and this only if necessary to the appeal.*

In this connection, the court said (351 U. S. 12, 20):

> "* * * We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

A stenographic transcript of the record has never been required in order to perfect an appeal in the State of Washington, pursuant either to rule of court, statute or constitution. *State ex rel. Roberts v. Clifford*, 55 Wash. 440, 443, 104 Pac. 631 (1909); *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 410, 115 Pac. 859 (1911); *Mattocks v. Great Northern Railway Co.*, 94 Wash. 44, 50, 162 Pac. 19 (1916); *State v. Evans*, 145 Wash. 4, 18, 258 Pac. 845 (1927); *State ex rel. Larpenteur v. Superior Court*, 183 Wash. 252, 255, 48 P. (2d) 205 (1935); *Livermore v. North-*

west Airlines, 6 Wn. (2d) 1, 106 P. (2d) 578; *Palin v. General Construction Company*, 45 Wn. (2d) 721, 277 P. (2d) 703; *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 314 P. (2d) 930.

These cases establish an unbroken line of authority.

In *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859 (1911), *supra*, the relator filed an incomplete narrative statement of facts. The respondent moved to strike it, and to substitute the notes of the reporter. The court held that if the statement were incomplete, it should be corrected, but that a transcript of the minutes could not be required. The court said (63 Wash., page 410):

> "The practice of bringing a narrative statement of the testimony to this court *is to be encouraged*. The statement in the affidavit filed on behalf of the respondent, that more than one hundred pages of the record have been *reduced to four pages*, does not to our minds indicate that it does not contain all the material facts testified to by the witness. * * * for our experience has taught us that the * * * reiterations of the trial are not always essential to give this court a proper understanding of the facts. * * * In whatever form proposed, *the burden is on the appellant to furnish a statement of the testimony* sufficient to show this court the facts upon which the assignments of error are predicated and to give this court a full understanding of the case. * * *" (Emphasis supplied.)

In *Mattocks v. Great Northern Railway Co.*, 94 Wash. 44, 162 Pac. 19 (1916), the appellant filed a

statement of facts based, at least in part, upon the notes of a private stenographer. The respondent moved to strike, upon the ground the appellant ought to have used the notes of the official reporter. The court denied the motion and said (94 Wash., page 50):

> "* * * There is nothing in either this statute or the statute to which the plaintiffs refer which requires that the statement shall be made up from the notes of the official court reporter, or from notes of a reporter at all. Indeed, the appellant may make up the statement from *his own notes* or from *any source* and may have it certified, so long as it correctly states the testimony given at the trial of the cause. The notes of the official stenographer may furnish a convenient reference as to what the actual testimony was should the parties disagree, but such are nowhere made the only permissible official record, * * * The motion is denied." (Emphasis supplied.)

In *State v. Evans*, 145 Wash. 4, 258 Pac. 845 (1927), the official reporter died before he was able to transcribe his notes. The parties prepared a narrative statement of facts from the notes of counsel and the recollection of the trial judge. The appellant then asked for a new trial upon the grounds the statement was not a transcript of the reporter's notes and so not complete as to the evidence. Answering this, the court said (145 Wash., page 18):

> "* * * It is a less convenient method to make a statement of facts in this manner than it is to make it from a transcript of the court reporter's notes, but there is no reason why any of the substantial rights of the appellant should

be denied by it. In this instance, we are pe
suaded that they were not. The record contai
a substantial outline of the testimony, and th
court has certified that it contains all of th
material facts, matters and proceedings occu
ring in the trial and not already a part of th
record therein. The appellant is not entitled
more."

In *State ex rel. Larpenteur v. Superior Cour*
183 Wash. 252, 48 P. (2d) 205 (1935), appellant wa
financially unable to pay the cost of a transcript. H
therefore prepared a narrative bill. The reporte
testified that some of the exceptions noted in th
narrative bill did not conform to his notes. Th
court therefore refused to settle the statement, an
the appellant sought a writ of mandate. The cou
granted the writ, ordered the lower court to dete
mine the true nature of the record and to certify
accordingly, and said (183 Wash., page 255):

"A party applying for settlement of a stat
ment of facts cannot be compelled to embod
therein a transcript of the reporters' notes take
on the trial. * * *"

The rule was confirmed in *Livermore v. North*
west Airlines, 6 Wn. (2d) 1, 106 P. (2d) 578, an
Palin v. General Construction Company, 45 Wn. (2d
721, 277 P. (2d) 703 (1954). In the latter cas
the respondent objected to the appellant's statemer
of facts upon the ground it was not a complete recor
in that it did not report the arguments, colloquy, an
proceedings with reference to presentation of th
findings and conclusions and the motion for a ne
trial. Respondent argued that inclusion of tho

items might cast light upon some assignment of error. To this, the court said (45 Wn. (2d) page 726):

> "* * * This argument, carried to its logical conclusion, would require that everything an appellant or his counsel said in court from the beginning of the litigation to the entry of the judgment, including all post-trial motions, be made part of the statement of facts. *A party is not required to embody in his proposed statement of facts a transcript of the reporter's notes taken on the trial.* If there are such statements or admissions in the record which should be included in the proposed statement of facts, it should be possible to point them out with some degree of particularity. * * *" (Emphasis supplied.)

The rule has been recently confirmed in *Grady v. Schneckloth*, 150 Wash. Dec. 806, 314 P. (2d) 930, rehearing denied February 28, 1958. In that case, the petitioner had been previously convicted of the crime of robbery. Upon appeal from his conviction, he had mailed a narrative statement of facts to the Chief Justice of the Supreme Court of the State of Washington. The Chief Justice returned it, advising the petitioner that it was inadequate because it had not been served upon opposing counsel, filed in the trial court, nor certified by the judge. This narrative statement was abandoned. It appears the petitioner then applied to the trial court for a transcript of the reporter's notes, pursuant to RCW 2.32.240 (derived from Rem. Rev. Stat. § 42-5, quoted Br. 57), which provides for such a transcript at public expense if in the opinion of the presiding judge it will promote justice. The request was

denied, and the petitioner abandoned his appeal. Denying his application for a writ of habeas corpus, the court said (314 P. (2d) page 932):

> "There was no impediment to the perfection of petitioner's appeal, but he voluntarily abandoned it. *Instead of serving and filing his proposed narrative statement of facts* so that it might be certified and thereafter used by him in his then pending appeal, petitioner applied to the trial judge under RCW 2.32.240, for a complete statement of facts as a pauper." (Emphasis supplied.)

Distinguishing *Griffin v. Illinois*, 351 U. S. 12, on account of the assumption of the necessity of a transcript in Illinois, the court said, 314 P. (2d) page 933):

> "Moreover, an appeal can be taken without a complete record under Rule on Appeal 34 (3), 34A Wn. (2d) 36, by filing a concise statement of the point or points on which appellant intends to rely. *The statement of facts then needs only be a narrative of so much of the evidence as may be necessary to consider the points specified.*
>
> " * * *
>
> "A stenographic transcript of the reporter's notes of the evidence taken at the trial is unnecessary in any case, civil or criminal. Thus the very basis of the *Griffin* case is completely and entirely absent. A narrative statement satisfies every requirement in that decision, and, moreover, if an appellant specifies the point or points which he desires to present on appeal, he may go up on a short record which *also may be in narrative form.* * * * " (Emphasis supplied.)

The court went on to observe that if a complete

record should be required, the law authorizes the trial court to furnish it upon showing of sufficient reason. This is dictum, which must be read in the light of previous decisions and of the rest of the opinion. The plain fact is that a stenographic transcript is *never required*. In this connection, the court said plainly (314 P. (2d) page 934):

> "*Livermore v. Northwest Airlines*, 6 Wn. (2d) 1, 106 P. (2d) 578, is a complete exposition of the procedural law respecting a statement of facts. We there said specifically, 'A party applying for a settlement of a statement of facts cannot be compelled to furnish a transcript of the reporter's notes.' We further said, 'The statement of facts may be narrative form, and *need not be in the form of a verbatim reproduction* of all that transpired during the trial of the cause.' In *Palin v. General Constr. Co.*, 45 Wn. (2d) 721, 277 P. (2d) 703, the court again reiterated the statement in the *Livermore* case, '*A party is not required to embody in his proposed statement of facts a transcript of the reporter's notes taken on the trial.*'" (Emphasis supplied.)

Since the services of court reporters generally cost less than the services of counsel, it is often expedient to use the reporter's notes rather than a narrative account. It may not ordinarily occur to a litigant to keep notes on the trial for use in a narrative bill, but he can certainly do so. The length of the trial is no obstacle to this. See *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859 (1911), *supra* (where one hundred pages of testimony were narrated in four pages). He can then prepare his own statement.

However, a man of means may estimate the cost of appeal and decide the prospects of success do not warrant it. Likewise, the indigent defendant may contemplate the effort and arrive at a similar conclusion. This apparently happened in *State ex rel. Grady v. Schneckloth*, 150 Wash. Dec. 806, 314 P. (2d) 930, *supra*, where the narrative statement disappeared after the Chief Justice suggested the correction of some irregularities. Surely, the petitioner is not entitled to the substitution of public funds for the effort otherwise required of him.

The provision of statute which allows the presiding judge to order a transcript at public expense if he thinks justice will be promoted (Rem. Rev. Stat., § 42-5; Br. 57) does not aid the petitioner's case (cf. Br. 14, 35). If *Griffin v. Illinois* had required a free transcript upon every appeal, the statute would be a superfluity. But since a narrative statement will suffice upon every Washington appeal, the denial of petitioner's request did not preclude his appeal. Therefore, it impeded no substantial right (cf. Br. 14, 35). A favorable disposition of his request would, of course, have spared him some effort, but he has no constitutional right to demand such a benefit.

Moreover, the exercise of the judge's discretion is reviewable. *Grady v. Schneckloth*, 150 Wash. Dec. 806, 314 P. (2d) 930, *supra; State ex rel. Bird v. Superior Court*, 30 Wn. (2d) 110, 190 P. (2d) 762 (1948); *In re Mason v. Cranor*, 42 Wn. (2d)

610, 257 P. (2d) 211. If *Griffin v. Illinois* is to stand as the law, any decision of the highest state court declining to order up the transcript can be reviewed here on *certiorari*. As this court stated in *Griffin v. Illinois*, the state may protect itself against frivolous demands.

Finally, however, if the foregoing statute were unconstitutional as vesting a discriminatory power in the judge, we do not see how the petitioner could take advantage of that fact. He is either entitled to a transcript or not, under the holding of *Griffin* as applied to the law of this state. The existence of an unconstitutional statute could not help him.③

Petitioner Was Not Entitled to Counsel Upon Appeal

This issue was not raised in our supreme court, nor was the question suggested either in the jurisdiction statement or the petition for certiorari. Therefore, it should be disregarded in this court. Rules of Supreme Court 40(2). Moreover, the issue is academic here. This petitioner discharged the two court-appointed attorneys after they had argued his motion for a new trial (R. 71, 77), and asserted that he wanted to appeal in his own behalf (R. 67, 69.). He asked for no assistance. In *Betts v. Brady*, 316 U. S. 455, 86 L. ed. 1595 (1942), *supra*, this court held that an intelligent defendant can waive

③ (And see *Brown v. Allen*, 344 U. S. 443, 484-485, *supra*, a death case where the trial court apparently had discretion to declare the appeal out of time where the statement was filed *one day late*.)

the right to counsel *at the trial.* And even in the federal courts, a petitioner is bound by a competent and intelligent waiver. *Johnson v. Zerbst*, 304 U. S. 458, 469. Assuming without conceding, the state were obligated to furnish counsel on appeal where requested, the petitioner has forfeited all such claim (R. 67, 69, 71, 77). The petition for writ of habeas corpus and the letters and affidavits in the record demonstrate this petitioner's ability (R. 6, *et seq.*). See *Betts v. Brady*, 316 U. S. 455, 86 L. ed. 1595 (1942), *supra; Johnson v. Zerbst*, 304 U. S. 458, *supra.*

This case therefore does not reach the question whether the state must furnish counsel under different circumstances. Suffice it to say that we know of no case so holding, and petitioner cites none. Representation is required in the federal courts, but on a basis not referable to the states. *Johnson v. United States*, 352 U. S. 565, 1 L. ed. (2d) 593; *Farley v. United States*, 354 U. S. 521, 1 L. ed. (2d) 1529 (1957).

However, we should note that petitioner overemphasizes the difficulties of presenting an appeal to the Supreme Court of the State of Washington. A narrative statement of facts may be concise. The abstract of record (no longer required) was not required of petitioner if his statement did not exceed one hundred pages. (Rule VI, 1 Rem. Rev. Stat. p. 139, 159 Wash. xxxv, set out in full at page 60, *et seq.* of appellant's brief.)

CONCLUSION

In conclusion, we submit that *Griffin v. Illinois* should be reconsidered and limited to cases, should any arise, where the states impose an unreasonable requirement as a prerequisite to appeal. At all events, *Griffin v. Illinois* should not be retroactively applied except as to a petitioner who had raised the point in a direct attack upon his conviction and had carried that attack to this court. In this case, the petitioner filed his own notice of appeal and prepared his own application for writ of mandate to direct the trial court to furnish him with a free transcript of the testimony. He was equally able to prepare an application for certiorari out of this court and failed to do so. The social consequences of a retroactive application of the *Griffin* decision would be serious. The limitation we propose is therefore strongly indicated.

The decision in *Griffin v. Illinois* requires no more than the purchase of a transcript for a defendant who must have it as a prerequisite to appeal. Such a transcript is not required in Washington and was not necessary to the perfection of petitioner's appeal in 1936.

Petitioner has waived his right to counsel. However, the history and nature of appellate procedure are such that the states are not obligated to furnish counsel on appeals to their courts.

We respectfully request that the order of the Supreme Court of the State of Washington denying petitioner's request for a writ of habeas corpus be affirmed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

HAYDN H. HILLING,
Assistant Attorney General,

Attorneys for Respondent.